In the Supreme Court of the United States

OCTOBER TERM, 1900.

No. 112.

ANNA V. WHITNEY, APPELLANT,

vs.

EDWIN B. HAY, APPELLEE.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District sitting in Equity.

On the 4th day of August, 1896, Richard U. Piper was the owner in fee of a parcel of real estate in the city of Washington, upon which there was a dwelling house known as No. 1512 Corcoran street, northwest. On that day Piper conveyed this lot with the improvements to his niece Anna V. Whitney. The original bill in this case was filed on the 8d day of December, 1896, by Edwin B. Hay against both Piper and Miss Whitney. It charges, in substance, that in March, 1897, Piper left Chicago, where he then lived, and came to Washington with his wife to live with the defendant, who at that time resided at No. 1535 P street, northwest, under an agreement to the effect that in consideration of Hay taking care of Piper and his wife as long as they lived they or the survivor of them—

> "would leave and convey by will or otherwise, all of the property, real and personal, of every nature and

> kind, wherever situated, to and unto this complainant, his heirs and assigns forever;"

that immediately after the Pipers reached Washington, it was agreed, "in consideration for the care of this aged couple," that the Pipers would adopt Hay as their son, and that Piper would build a house for the complainant for the joint occupation of himself and wife and the complainant and his family; that the complainant thereupon purchased the lot in controversy in this suit; and that a dwelling house was thereupon erected on that lot, into which all the parties moved on the 1st day of August, 1888 (Rec., 2, 3). The bill further avers that in August, 1892, Piper and his wife went to Saratoga, where shortly afterwards Mrs. Piper died; that upon the death of his wife, Piper became "temporarily mentally affected" and refused to return to Washington; and that one S. G. Thomas, a former business agent of Piper's in Chicago, forcibly took possession of Piper and his effects and carried him away to Chicago (Rec., pp. 3, 4). Finally, the bill charges that on the 4th day of August, 1896, Piper, who in the meantime had gone to live with his niece, Miss Whitney, in Maine, conveyed the ground in controversy to her. The bill avers that Hay and his wife had performed the alleged contract on their part so far as it was possible for them to do so, but avers that—

> "notwithstanding the performance and the readiness of the complainant to perform his part of the contract, the defendant (Piper) has persisted and still persists in remaining away" (Rec., p. 5).

The principal prayer of the bill is that the deed conveyveying the property in question from Piper to Anna V. Whitney should be declared a fraud upon the complainant and a violation of the contract between Piper and him, and that the defendant, Anna V. Whitney, should be decreed to hold the property in trust for the complainant in accord-

ance with the alleged agreement between him and Piper.

The bill did not waive answers under oath, and each of the defendants filed sworn answers, denying all the material averments of the bill.

Piper in his answer averred that Hay and his family were in possession of the house on Corcoran street by virtue of a *lease* from him, Piper, and not otherwise (Rec., pp. 16, 20). This averment was also made in Miss Whitney's answer, and she appended thereto a copy of the lease itself (Rec., p. 13, 42). This instrument will be referred to further on. In both answers it is averred in substance that Piper ceased to live with Hay because of certain disagreeable relations which had arisen between him and Mrs. Hay, and the children of Mr. and Mrs. Hay, which rendered his further abode with the Hay family unpleasant and undesirable (Rec., pp. 9, 17).

A good deal of testimony was taken in the case, an abstract of which is appended hereto beginning at appendix page 1 of this brief.

The deposition of the defendant Piper, in his own behalf, was taken on written interrogatories, Hay attending and cross-examining in person (Rec., pp. 28–41).

We have seen that in his bill Hay averred that he purchased the lot upon which the house on Corcoran street was built (Rec., p. 2). The answers deny this and allege that the lot was bought and the house built with Piper's money, except that Hay paid for some parts of the work; all the money which he so advanced being afterwards fully repaid to him (Rec., pp. 8, 16, 77).

While the suit was still pending, on August 4, 1897, the defendant Piper died, and thereafter the case proceeded against the defendant Anna V. Whitney alone (Rec., pp. 300, 301). The case came on for final hearing before Mr. Justice Hagner, who, on the 9th day of March, 1898, entered a decree requiring the defendant, Anna V. Whitney, to convey the property in controversy to the complainant (Rec., p. 299).

On appeal by the defendant, the Court of Appeals affirmed this decree (Rec., p. 327). The opinion of the Court of Appeals was delivered by Mr. Justice Shepard (Rec., pp. 311–327). Mr. Chief Justice Alvey delivered the following separate opinion:

> "I concur in the affirmance of the decree in this case, but, I must say, that I do so with great doubt and hesitation. The case, on the facts as proved, shows a strong claim for compensation on a *quantum meruit*; but as a case for specific performance of an express contract, with the Statute of Frauds relied on as a defense, it is quite different, and presents great difficulty and doubt to my mind, both as to the proof of the specific contract alleged, and the part performance thereof, to take it out of the bar of the statute. I yield my doubts, however, in deference to the opinion of my brother judges" (Rec., p. 327).

From the decree of the Court of Appeals, the defendant, Anna V. Whitney, duly perfected an appeal to this court (Rec., pp. 328, 329).

The property in controversy is of the rental value of from $850 to $900 a year (Rec., pp. 65, 66). The lot and house together cost about $21,000 (Hay, Rec., p. 248).

ASSIGNMENT OF ERRORS.

The court below erred:

1. In holding that the evidence in the case proves that a contract had been made by Richard U. Piper with the appellee, by which Piper agreed to devise to him the real estate in controversy.

2. In holding that the terms of the alleged oral agreement were established with sufficient certainty to justify a court of equity in decreeing a specific performance thereof.

3. In holding that the evidence established such part performance of the oral contract as would take the case out of the Statute of Frauds.

4. In holding that the appellee was entitled to a decree in his favor, notwithstanding the admitted fact that for over four years before the bill of complaint was filed and for about five years before the death of Piper, the appellee did not support him or his wife, or in any other way render service under his alleged contract.

5. In holding that there was sufficient mutuality in the alleged contract to make it the subject of specific performance at the instance of one of the parties thereto.

6. In not holding that the complainant's delay in attempting to enforce the alleged contract was a bar to his suit.

7. In not dismissing the bill.

ARGUMENT.

A simple reference to the alleged contract relied upon in the bill of complaint in this case and an analysis of the evidence bearing upon the question of the existence of such a contract, will, we think, render unnecessary any elaborate argument and of itself lead inevitably to the conclusion that all the assignments of error should be sustained. In making this statement, we bear in mind what was said by this court in another case which came up from the Court of Appeals of the District—Baker *vs.* Cummings, 169 U. S. 189–198—

> "that when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it be clear that their conclusion was erroneous."

The statement in the bill of complaint of the alleged

original agreement between Piper and Hay of March, 1887, is not merely vague, it is meaningless. The statement of that contract is that Piper and his wife, or the survivor of them, agreed that they—

> "would leave and convey by will or otherwise *all of the property*, real and personal, of every nature and kind, wherever situated,"

to the complainant. Whether this means all the property of both of them; or all of the property of one of them; or all of the property that they, or one of them, then owned; or all of the property that they, or one of them, might own at some time thereafter, there are no means of determining. As to the particular lot in controversy, the charge of the bill is that after the performance of the contract of March, 1887, had been entered upon, Piper and his wife further agreed to build a house—

> "which should be the property and a part of the estate of the said Richard U. Piper to be left by will to the complainant."

The bill does not even state whether any of the supposed agreements on the part of Piper were in writing or not. It is everywhere stated that he agreed and *covenanted* to do certain things. The inference would be that a written contract, under seal, was meant; but as a matter of fact it turned out that the agreements really relied upon were wholly verbal.

Unsatisfactory as are the statements of the alleged agreements in the bill, the testimony of the complainant himself on the same subject is still more vague. To appreciate this, it is necessary to read at least his examination in chief, which will be found on pages 176 to 228 of the Record. After giving a history of the relations between himself and Mr. and Mrs. Piper, prior to March, 1887, and producing certain letters from them or one of them to him, written during that period, the complainant said that in that month

they came to his house in Washington. He was then asked by his counsel under what conditions or arrangements they came to his house at that time. His answer was as follows:

> "Pursuant to the conversations we had had and the communications that had passed between us prior to their arrival, they came to live with us as a mother and father would come to live with children, and their dwelling with us was conditioned upon a covenant and agreement entered into, that in consideration of permitting them to reside with us in this relationship during the balance of their lives and the care to be given to them, that he would build a house in the city of Washington, District of Columbia, in which we should live together and that at his death, not only the house but all his property should be willed to me. Dr. Piper stated that should I be taken away that he would provide for Mrs. Hay and the children as if they were his grandchildren and she his daughter, and that should both of us be taken away during his lifetime, he would likewise provide for the children, and that he would rear and raise them, and upon this Mrs. Piper and Dr. Piper, Mrs. Hay and myself shook hands, and the Doctor himself called upon Heaven to witness the sincerity of the agreement" (Rec., pp. 184–185).

It will thus be seen that in his testimony, as in his bill of complaint, Hay claims that when the Pipers came from Chicago to Washington in March, 1887, and went to live with the Hay family at 1535 P street, they entered his house, and he received them, under a contract then existing, by which he was to care for them during the remainder of their lives, and Dr. Piper was to devise to Hay all his property. As for a long time prior to March, 1887, the Pipers were living in Chicago and Hay was living in Washington, all the communications between them on this subject were in writing. The letters upon which Hay relies as tending to show the existence of this contract have been produced and are in evidence (Rec., pp. 179, 180, 181, 182, 183, 184, 276).

Nearly all of them were written by Mrs. Piper. Many of them she signed "Father and Mother Piper." We aver with confidence that, even assuming what is not shown, that what was written by Mrs. Piper was known and authorized by Dr. Piper, there is not a word in any of these letters which tends in the remotest degree to show that there was any *contract* on the part of either Dr. Piper or his wife, that they would convey all their property, or any of their property, to the complainant. The principal letter is one dated January 14, 1886 (Rec., p. 180). In that letter "Father and Mother Piper" inform "Darling Edwin and Florence" that the Doctor has that day, with Mrs. Piper's approval, executed a will giving to Hay, or to Hay and his wife, all their property, except a few hundred dollars. It is plain from the language of this letter that this proposed disposition of their property by the Pipers was a voluntary act on their part growing out of the feelings of affection which they then entertained toward Hay and his wife. Several of the letters between January 14, 1886, and March 25, 1887, when the Pipers went to Washington, contain allusions to the fact that the property of the Pipers on their death is to go to the Hays, but in none of them is there any suggestion that this arises otherwise than out of the existence of the will of January 14, 1886. During the same period there are in the letters a few references to a proposed visit to Washington. In a letter dated October 5, 1886, written by Mrs. Piper and signed "Mother and Father Piper," the writer says:

> "We shall be most happy to come to Washington when it is convenient all around. . . . We long to see you all and if we live shall come when you are ready" (Rec., p. 182).

In a letter dated November 19, 1886, written by Mrs. Piper and signed in the same way, after asking Hay's advice as to investments, Mrs. Piper says:

> "Please write on receipt of this what you think of

> the matter, or is it best to wait until we come to W. and then invest" (Rec., p. 183).

In a letter dated March 11, 1887,—two weeks before the Pipers came to Washington—Mrs. Piper, still signing herself "Father and Mother Piper," writes that the Doctor must go somewhere, and that—

> "if it is not perfectly convenient for us to come to Washington at present, we will wait and take a short trip to Colorado, or somewhere else" (Rec., p. 184).

In a letter, written March 18, 1887, one week before they came to Washington, Mrs. Piper writes to Hay that she is anxious about the Doctor on account of his health, and adds:

> "If we live and the Doctor is able, I think we will start for W. sometime next week. . . . I would not come now as you are situated, did I not feel so anxious about the Doctor, and I cannot get him started for any other place now, although he did think he would go to Colorado, but he dreads going among strangers" (Rec., p. 184).

In considering these letters, it must be remembered that they are letters selected by Hay himself from a great many which he says he received from the Pipers about this time (Rec., p. 184).

It should be remembered also that when the Pipers went to Washington, in 1883, they stopped for a few days at Hay's house, and according to Hay's testimony they then suggested they would like to "spend the balance of their days" in Hay's family. But this proposition was distinctly declined by Mr. and Mrs. Hay (Rec., p. 177, 178, 179). So far as the testimony discloses, Hay did not meet either Dr. or Mrs. Piper after this visit in 1883, until they came to Washington in March, 1887, so that confessedly the foregoing selected letters are the sole foundation for Hay's claim that when Dr. Piper came to Washington in March, 1887

he did so under an agreement that if Hay would take care of him and his wife during the rest of their lives, they would convey all their property to him. In this connection we invite attention to that part of the opinion of the Court of Appeals which refers to this part of the case (Rec., p. 312, 313, 314), as showing that that court found nothing in the record inconsistent with the conclusion which we have just stated.

It is quite apparent, we think, that the facts in this matter are that prior to 1886 the relations between the Pipers, on the one hand, and the Hays, on the other hand, became exceedingly close and affectionate; that the Pipers in 1886 voluntarily decided to leave their property on their death to Mr. and Mrs. Hay; that influenced by the knowledge of this generous provision for them, they invited the Pipers to come to Washington and live with them; and that nothing occurred before their arrival in Washington, in March, 1887, which turned Piper's voluntary and revocable intention to so dispose of his property into a hard and fast obligation, from which he was not at liberty to recede.

Nor is there anything in the evidence to indicate that after the Pipers came to Washington there was any change in the situation of the parties in this regard.

It is true that from March 25, 1887, until August 1, 1888, the Pipers lived with Hay at his house on P street. There is no evidence that during that time they paid anything for their board and lodging. But soon after their arrival the lot on Corcoran street was purchased and an arrangement was entered into by the parties for the joint occupancy of the house on that lot, when it should be finished. That was a large house and Hay and his family were to have the use of all of it, excepting the few rooms to be retained for the exclusive use of Dr. and Mrs. Piper. The feelings of gratitude on the part of Mr. and Mrs. Hay towards the Pipers on account of the will which had been made in their favor in January, 1886, and their anticipation of soon enter-

ing and occupying for an indefinite period the large and more comfortable house on Corcoran street, fully accounts for the failure of Hay to charge the Pipers for their board during this period of sixteen months. This is substantially what Hay himself states. He says:

> "Realizing that this was to be a lifetime affair, and *as all their written communications had proved that they had done so much for us, we wanted to make home as delightful and as pleasant as possible*" (Rec., p. 186).

The evidence relied upon to establish the principal contract relied upon consists almost entirely of conversations between Piper or his wife and the witnesses, and there is very little, if any, of it that is not consistent with the theory that Piper's testamentary intentions grew out of his feelings of affection and friendship toward Hay and his family, and not out of any contract relations between him and Hay. Referring the court to the abstract of the evidence contained in the appendix to this brief, we proceed to refer more in detail to the evidence relating to the alleged specific agreement, by which it is claimed that Piper agreed to devise to Hay the house No. 1512 Corcoran street.

Regarding the averment of the bill that Hay purchased the Corcoran street lot, it is sufficient to say that in his own testimony the somewhat important fact is elicited that he paid for the lot with Dr. Piper's check (Rec., p. 190). Hay did indeed advance by way of a loan to Dr. Piper about one thousand dollars to pay for part of the work of finishing the house, but every cent of the money so advanced by him was paid back by Dr. Piper (Rec., pp. 193, 235, 237).

Mr. Hay testifies that his family and Mr. and Mrs. Piper moved into the house which is the subject of this suit, about the *first day of August, 1888* (Rec., p. 192). There is in the record a paper dated Washington, D. C., *July 30, 1888*, which was produced by Piper's counsel and exhibited

to the complainant while he was under cross-examination. The original paper on file in the court below is a typewritten document. Hay admitted that so far as it goes this paper was an "expression of the arrangement of the allowance" (Rec., p. 234, 5). It will be found on page 281 of the Record. It purports to be a complete statement of the agreement between the parties, and it in no way refers to any obligation on the part of Piper to devise this property to Hay. But it is a detailed and complete contract as to the terms upon which Piper and his wife on the one hand and Hay and his family on the other, are to live in the house into which they were all about to move when it was prepared.

It provides that as an equivalent for the occupancy of the house by Hay and his family, he is to furnish satisfactory board and fire, lights, and the attendance of servants for Dr. and Mrs. Piper, and that the agreement itself and consequently the right of Hay and his family to occupy the house, are to terminate with the lives of Dr. and Mrs. Piper.

In the latter part of August, 1892, Piper and his wife went to Saratoga Springs (Rec., p. 200). Shortly before Piper left Washington on this journey, he had several consultations with a lawyer, who was a neighbor of his and with whom he was very intimate, in reference to the preparation and execution of a will which he was about to make. This lawyer, Mark D. Brainard, testified that Piper submitted to him a form of a will which he, Piper, had himself written; that he, Brainard, made some corrections in this draft by lead pencil interlineations; and that the paper was then copied and executed by Piper in due form of law, as his last will (Rec., pp. 66, 67). The original draft as amended by the witness he had preserved and it is in evidence (Rec., pp. 74–75). By this instrument, which is dated June 23, 1892, Piper gave to his wife all his estate, except the sum of $1,000, which he bequeathed to his sister Victoria A.

Whitney, (the mother of the appellant in this case). At the end of the will is this paragraph:

> "I desire that my wife, Elizabeth A. Piper, shall at her death, if she so choose, give to Edwin B. Hay the sum of $10,000.00."

When the Pipers went to Saratoga, in 1892, they locked up the rooms which they occupied and took the keys with them (Rec., p. 215). Hay testifies that a long time afterwards when these rooms had been opened he found in them two testamentary papers, one written by Dr. Piper, and the other by his wife, of the existence of which he had no knowledge until they were thus accidentally brought to his notice (Rec., 215, 227). That one of these papers, which is said to be signed by Piper, gives to his sister, Victoria A. Whitney, two thousand dollars; to a brother in law, five hundred dollars and certain pictures; and to Hay the rest of Piper's estate. This instrument, while purporting to be signed by Piper, seems never to have been published as his will and has no attesting witnesses (Rec., p. 280). It was therefore void as to real estate in the District of Columbia. See Abert's Compilation, p. 557. The other paper, purporting to be signed by Mrs. Piper, has no date or witnesses, and simply provides that in case of the death of herself and husband near together, certain articles which are enumerated are to go to her friends.

The evidence is abundant that at least one reason why Piper left the house on Corcoran street and went to Saratoga ostensibly for only a temporary absence, was his dissatisfaction with his treatment. He so states in his deposition (Rec., pp. 30–36). To an intimate friend of himself and wife, Mrs. Sarah A. Wayne, he confided his troubles on two occasions, the last time just before he went to Saratoga (Rec., pp. 62, 63). Mrs. Piper joined in these complaints to Mrs. Wayne (Rec., p. 64). To the lawyer, Mr. Brainard, who drew the will of July, 1892, both Dr. and Mrs. Piper made

similar statements, the former being particularly emphatic on this subject when he instructed Brainard to draw the will in question and while Brainard was endeavoring to dissuade him from making that will (Rec., pp. 68, 69, 70).

Horace A. Piper was a distant relative of Dr. Piper. Although Mr. Hay met the witness frequently for two or three years while Dr. Piper was living with Hay, Hay ~~they~~ never mentioned to the witness the fact that he was living with Dr. Piper (Rec., p. 72). When he did find out that Dr. Piper was in Washington he visited his relative very little, because he and his wife got the impression from the conduct of Mr. and Mrs. Hay that they did not like to have them come to the house (Rec., pp. 71, 72). In several conversations with this witness, both Dr. and Mrs. Piper told him that their relations with Mr. and Mrs. Hay had become unpleasant, and he adds—

> "On the last visit they told us that they were going away, and the Doctor proposed to sell me his house" (Rec., p. 72).

The admissions made by Hay himself on this subject in his testimony, strongly corroborate the testimony of these witnesses so far as the trouble with Mrs. Hay is concerned (Rec., pp. 199, 240).

Early in December, 1892, while Mrs. Piper was lying ill at Saratoga, Hay went to that place. In Piper's deposition, in reply to the question whether he executed a will at Saratoga about the 8th of December, 1892 (Rec., p. 26), he testified (Rec., p. 31) that Hay came there trying to induce him, Piper, to make a will and give him, Hay, his property, and that possibly he might have signed a will of that kind. Says Piper:

> "He took me in his arms one time and clasped me to his breast. He came to the room where I was—vacant room—I was standing there—took me in his arms around me and clasped me to the breast. 'You must act with me, Doctor, you must act with me'" (Rec., p. 31).

Hay himself, when asked a question relating to an effusive letter which he wrote to Piper about this time, said it—

> "was written for the purpose of endeavoring to reason with and prevail upon the Doctor to cling to me rather than to anybody else" (Rec., p. 250).

There is no doubt that early in December, 1892, Piper did make and execute, in the presence of witnesses, a will making Hay the principal beneficiary of his estate (George S. Hine, Rec., p. 79; Francis E. Hine, Rec., p. 81; Hay, Rec., p. 226). Hay testifies that at that time the Doctor told him that he, Piper, had made a will bequeathing to his, Piper's wife, all of his property, but now that she was passing away he wanted to change it. Accordingly, sitting at the bedside of the dying woman, Hay wrote and Piper executed, in the presence of three witnesses, a will, dated December 6, 1892 (Rec., p. 203). This instrument, however, was left with Dr. Piper and apparently as soon as Hay went back to Washington, Piper tore up the paper (Rec., pp. 80, 226, 227). Mr. Hine, one of the winesses to the will, took the pieces out of the slop pail where Piper had thrown them, and gave them to Hay when he went to Saratoga the second time, immediately after Mrs. Piper's death, which occurred January 3, 1893 (Rec., pp. 80, 226, 227). Most of the fragments of this will have been put together and the instrument thus preserved will be found on page 82 of the Record. Although Hay says that the principal reason for executing this paper was that Piper believed that his wife was dying, yet by it he gives his entire estate to Mrs. Piper for life, and as to this very house on Corcoran street, directs that Mrs. Piper is to control it—

> "and to *rent it* and live in it, during her life, and receive from it for her support and *use the rents* and proceeds and profits" (Rec., p. 82).

All this is manifestly inconsistent not only with Hay's testimony of Piper's reason for executing this will (Rec., p.

203), but with the contract which he now claims was then in existence between him and Piper, in reference to the Corcoran street house.

A curious thing in this connection is that although Hay claims to have been ignorant until a long time afterwards of the existence of the unattested will in his favor made by Piper just before he left Washington to go to Saratoga (Rec., p. 227) yet in a letter dated November 11, 1896, written by Hay to Piper he said :

> "Your leaving for a visit was with the full intention of spending away a few weeks, and then returning to your home, and, as a token of your good will and faithfulness to the obligation, you did, of your own free will and accord, uninfluenced in any way and with sincere loyalty on your part, as a last act, make a last will and testament (confirmatory of several others that you made in the same direction), devising to me the property not only here but also in Chicago, which I appreciate as being an evidence of the recognition of our relationship and an overt act of your affection for me" (Rec., p. 291).

Mrs. Hine as a witness for the complainant testifies that Piper executed another will at Saratoga after his wife died (Rec., p. 82). And Hay testifies to the execution by Piper of apparently still another testamentary document about the same time giving his nurse "fifteen thousand dollars or some amount of money" (Rec., p. 249).

It is quite apparent that during some part of his stay in Saratoga, Dr. Piper had become mentally incompetent to execute any legal paper. Hay testifies that this mental incompetency did not begin until after Mrs. Piper's death (Rec., p. 243). But his own witness testifies that this condition lasted about four or five weeks and that it commenced about a week before Mrs. Piper's death (Rec., p. 80). And Miss Whitney says that while Mrs. Piper was on her sick bed at Saratoga she very frequently wrote to Mrs. Whitney about her husband's illness (Rec., p. 56).

On January 5, 1893, immediately following Hay's departure from Saratoga, after his second visit there, on which occasion he brought to Washington the remains of Mrs. Piper, the Doctor wrote to Hay, complaining in substance that Hay had made a prisoner of him (Rec., p. 206). To this Hay replied, January 7, 1893: "You are mistaken when you say that I have set a watch over you, to keep your friends away" (Rec., p. 284). Yet, on his cross-examination, Hay was compelled to admit that he had instructed the man who was nursing Piper—

> "to be very watchful and very careful not to allow any one to enter except the physician and those about the house in attendance on Dr. Piper" (Rec., p. 249).

The reasons which Hay gives for keeping everybody away from Dr. Piper, except those whom he designated, were—

> "that there was a conspiracy between the former nurse and an attorney in Saratoga for the purpose of obtaining from the Doctor money, because this attorney would go with the nurse and for every visit, like a physician, he would make a bill of so much" (Rec., p. 249).
>
> "So," says Hay, "I took the precaution, for Dr. Piper's interests, to see that these people did not approach him."

And that the physicians who had charge of Piper would not allow him to go to Washington, saying that he was not well enough to travel; which struck Hay as a—

> "scheme on the part of the attending physicians, as they were making three visits a day, and at $2 a visit; that was quite a big thing at Saratoga" (Rec., p. 205);

In this bill and throughout his evidence, one of the principal contentions of the complainant is that Thomas took Piper from Saratoga to Chicago against the latter's will. It

is worthy of note in this connection that Hay himself modified the blockade which he had created around Dr. Piper, so as to let Dr. Thomas see him, and that he did this because Thomas told him, Hay, that he thought he, Thomas, could prevail upon Piper to go to Washington, and Mr. Hay adds:

> "Mr. Thomas staid at Saratoga, but I could not stay there to watch him; my business called me to Washington, and I had to leave" (Rec., p. 256).

Piper remained in Chicago in Dr. Thomas' house from about January 9, 1893 (Rec., p. 208), until June, 1895 (Rec., pp. 57, 58). There is no question that during this time Thomas exercised undue influence over him for the purpose of getting his property.

It should be noted, however, that in the course of time a scheme was devised by which Piper could communicate with Hay without Thomas' knowledge, and that in a letter written by Piper himself to Hay on the 26th of August, 1893, Piper said: "Certainly I am treated with the utmost kindness and attention by Dr. Thomas and his family" (Rec., p. 211).

Hay avers in his bill and in his testimony in this case, that during the whole of Dr. Piper's stay in Chicago, Piper was old, infirm and weak minded and that Thomas had him in his clutches for the purpose of getting his property; but Hay never took any steps in any court for the protection either of Piper's person or of his property. Piper's own sister, Mrs. Whitney, for a long time did not know where he was. Finally in June, 1895, her daughter, Miss Whitney, the appellant, went to Chicago and took him to her mother's residence in Newport, where he spent the remainder of his days (Rec., p. 57, 58).

On September 4, 1893, Piper who was then in Chicago with Thomas, with his own hand, wrote to Hay as follows:

"DEAR NED: I am on my back as the result of a fall; looks as if it might be for a month, perhaps. *In order to settle matters between us in regard to the house, etc., I think you should come personally to Chicago*, perhaps as soon as convenient" (Rec., p. 212).

Hay testifies to the receipt of this letter, a bout the time of its date, and proceeds to state that he went to Chicago accordingly, and found the Doctor confined to his bed—that the Doctor wanted to go home to Washington with him but was suffering from the effects of the fall and could not go (Rec., p. 212).

So it will be seen by the testimony of Hay himself, shown to be true by this letter from Piper, which Hay produced and put in evidence, that Piper informed Hay of the injury which he had sustained and asked him to come to Chicago for the express purpose of settling matters between them in regard to the house in Washington. Yet, in his bill of complaint, Hay upon his oath said that on this occasion *Piper sent for him to come to Chicago to bring him home*; that he went to Chicago for that purpose, and *when he arrived there he found that Piper had injured himself* by falling down the stairs, so that it was impossible to remove him (Rec., p. 4).

Another significant circumstance in this connection is that although Hay testified that he went to Chicago in response to a request from Piper for the purposes of settling matters between them in regard to the very matter which is now in suit, he does not anywhere in his deposition, which covers nearly ninety pages of the printed record in this case, say a single word as to what, if anything, took place between him and Piper while he was in Chicago on this occasion, in reference to the proposed settlement. But what did take place between them at that time in reference to the matter of the house on Corcoran street is clearly inferred from what followed.

The most important piece of evidence in this case is the

lease of October 20, 1893 (Rec., p. 42). The instrument in evidence is signed by Hay alone. It was prepared, however, in duplicate, the copy signed by Piper having been kept by Hay (Rec., p. 215). The term of this lease did not expire until January 1, 1897. The bill was filed December 31, 1896, while Hay was in possession of the property in dispute, as Piper's tenant under this lease. Yet, *he concealed from the court the fact that such an instrument had ever been made.* In his evidence he says that he signed the lease "knowing that whatever might occur *it would hold him in possession of the property* at least during its existence" (Rec., p. 214). And the possession so obtained and held and concealed from the court is the possession which he relies upon as the part performance which is to take his case out of the statute of frauds.

Manifestly, it was of the utmost importance that the letter in which the duplicates of the lease were sent to Hay from Chicago should be produced. Hay's custom was to keep all letters from Piper (Rec., p. 215), and some dozens of them were produced in evidence. When asked by his counsel for this particular letter, Hay said that it seemed not then at hand, but that if he had it he would file it as an exhibit (Rec., p. 215). It was not filed, nor is there any proof that it had been lost.

We have, however, a subsequent letter dated December 5, 1893, by which Piper returned to Hay the copy of the lease which he, Piper, signed (Rec., p. 279). From this letter it appears that when Hay returned the copy of the lease to Piper to be signed by him, he also sent a receipt which Piper's attorney, whom Piper designates as "Judge Adams," did not think was quite explicit enough, and Piper accordingly inclosed in the letter for Hay's signature another "receipt," saying that he, Piper, did not see any especial difference between the two. This paper, like the lease, was dated October 20, 1893 (Rec., p. 279). It purports to be an acknowledgement by Hay of the satisfaction of all claims or

demands growing out of any agreements or transactions between Piper and himself, and the statement by him that he has no claim on the Corcoran street house, except the leasehold interest, under the lease from Piper of even date. This paper was not signed by Hay or returned to Dr. Piper. Hay testified that he refused to sign it; that this was the only wish of Dr. Piper's with which he did not comply, and—

> "that the whole matter of the lease, so called, was nothing more than a scheme of Dr. Thomas'" (Rec., p. 217).

But it is clear enough that this attempted settlement was Piper's act and not Thomas'. Several months afterward (July 29, 1894), Piper writes to Hay referring to this paper and urging Hay to send it to him (Rec., p. 280). On July 3, 1895, Piper wrote to Hay acknowledging the receipt of an installment of rent, and saying: "Would you not like the whole house providing we can make a treaty to that end?" (Rec., p. 218). October 23, 1896, he again wrote to Hay, saying:

> "Would you like to rent the house again after your lease expires? If so, you shall have the first chance" (Rec., p. 224).

The last two of these letters were written after Piper had gone to Newport, and when there was no pretense that he was any longer under the influence of Thomas.

Piper, at the best, was a crotchety and feeble old man, drifting gradually into second childhood. Hay was an active man of middle age, a lawyer by profession, and must be presumed to have known that any verbal arrangement he may have had with Piper in regard to the house on Corcoran street was void under the Statute of Frauds.

Even when Hay was advised of the recording of the deed from Piper to Miss Whitney, he set up no distinct claim against Piper in reference to that property. His letter to

Piper after he learned of that deed is dated October 20 1896, and is as follows:

> "My Dear Doctor: I sent you a letter on the 27th day of September, giving you an account of the storm, and also sent you a letter on the first day of October, with enclosure; to neither of these have I received any reply.
>
> "I have observed also, of one further step in your affairs in the recording of the deed to Miss Whitney. I will not comment upon that at this time, but our relations are such that it seems to me that you might have consulted me upon the matter prior to taking such a step. In all of our relationship, I have done to you only what kindness and affection has prompted and have faithfully carried out my part of the sacred contract, and while I do not for a moment wish to come between you and your good sister, who has been more than kind to you during the past two years, still there are tokens of affection between you and me which should not be slighted off. I should very much like to hear from you. Very affectionately yours, E. B. Hay" (Rec., p. 290).

By the lease dated October 20, 1893 (Rec., p. 42), which Hay signed and returned to Piper as above stated, Hay was to have the house in controversy as Piper's tenant for a period of three years from January 1, 1894. He agrees to keep the premises in repair; to reserve for Dr. Piper's use certain rooms, which are described; to pay the taxes on the property, and to pay rent in the sum of $200 a year, payable quarterly in advance. He further covenants that at the expiration of the term "he will yield up said leased premises" to Piper. But within the three years, on December 31, 1896, Hay began this suit. After the bill had been filed, and after the term of the lease had expired, Miss Whitney, as the then owner of the premises, undertook to get possession of the property by proceedings before a justice of the peace under the landlord and tenant laws of this District. Thereupon, a sup-

plemental bill was filed and the further prosecution of that proceeding was enjoined pending this litigation (Rec., p. 300).

In delivering the opinion of the Court of Appeals in this case, Mr. Justice Shepard conveys the impression that Miss Whitney's contention is that there was never any agreement between Dr. Piper and Hay in reference to the Corcoran street house, except the lease dated October 20, 1893. He says, in substance, that since Piper sent with the lease an instrument which he asked and expected that Hay would sign, which referred to "any agreements or transactions" between Piper and Hay, there is no escape from the conclusion that the other agreement referred to must have been the one claimed by the complainant (Rec., p. 326).

We respectfully submit that this is a mistake. In his answer Piper stated that—

> "arrangements were made with the complainant to board this defendant and his wife, and in order to better accomodate the family, which was thus augmented by the presence of the defendant and his wife, he decided to build a house in the city of Washington, which should be leased to the complainant, whereby this defendant and his wife could have more commodious rooms and be better situated and enable the complainant to provide better for their comfort and accomodation" (Rec., p. 16).

And in his deposition Piper stated:

> "I mean I lived with him, and boarded with him, with a verbal agreement to pay my board, and he was to pay me for occupying my house; he should occupy my house. I built a house and he was to occupy it and pay me in board; pay the insurance, pay the taxes, keep things in repair; and for furnishing me good and sufficient board. . . . Well, his agreement was that I have sufficient fire and heat in my room" (Rec., p. 28).

In Piper's letter to Hay of October 23, 1896, occurs this language:

> "Now as for the agreement about my boarding with you while you was in my house, you was to pay me $200.00 a year, furnish board for myself and wife, etc." (Rec., p. 224).

The unsigned paper of July 30, 1888, which was prepared a day or two before the parties moved into the Corcoran street house indicates that a contract with mutual obligations on each side was under consideration between Piper and Hay, in reference to their joint occupancy of the house (Rec., p. 281, 282).

Indeed, it seems obvious that there must have been some arrangement made between the two families as to the terms on which they were to jointly occupy the house 1512 Corcoran street. No doubt it was because there was some such arrangement, the carrying out of which any longer had become impossible because of Mrs. Piper's death and the removal of Dr. Piper from Washington, that the latter wrote his letter of September 4, 1893, to Hay, requesting Hay to come to Chicago to settle matters between them in regard to the house (Rec., p. 212). Hay and his family were then living in Piper's house, and the latter was getting no income whatever from it.

Nor would it follow, we submit, as Mr. Justice Shepard assumes, that if the "agreements and transactions" referred to in this unsigned paper of October 20, 1893, were agreements and transactions in regard to Piper's testamentary disposition of his property, that any reference was made to such a contract as is set up in the bill of complaint in this case. We have already gone over part of the testimony, tending to show that there was no definite and certain agreement between the parties in this regard; and we have referred the court to our abstract of the evidence, which will, we think, strengthen this conclusion.

We can not refrain, however, from inviting the attention of the court in this connection to parts of the evidence in this case which demonstrate that there was nothing definite even as to the person or persons to whom Dr. Piper (whether of his own volition or by contract) was to give his Corcoran street house by his will.

When Hay in person was cross-examining Piper, he asked Piper whether he did not enter into—

> "a covenant and contract, calling Heaven to witness, that in consideration of the complainant caring for you and your wife and you living with the complainant and his wife that you would regard and adopt *him and his wife* as your children, and would make a will leaving to *them* all your property upon the death of yourself and your wife" (Rec., p. 35).

About the time that the lot on Corcoran street was purchased, Piper and Hay together went to the office of a lawyer named William A. Cook (Rec., p. 190). While there Hay endeavored to get Piper make a deed conveying to him, Hay, the Corcoran street lot.

Piper declined to make such a deed; said that he preferred to make a will; that he did not believe in one parting with his property during his lifetime, and adding—

> "that if Edwin should be taken away that he would take care of Mrs. Hay and the children, and that if she were taken away, he would likewise care for and rear the children and at his death leave the property to *them*" (Rec., p. 244).

Mrs. Kearfoot, who had been living with the Hays in their house for thirteen years, tells of a conversation she had heard between the Pipers and the Hays in much the same terms (Rec., p. 266).

Mr. Brainard, the lawyer, who drew the will of July, 1892, for Piper, says he learned from the Pipers that they intended to make their home with the Hay family and to make Hay's *son* their heir (Rec., p. 69). At the time he

prepared that will, Dr. Piper destroyed another, and in the will which was so destroyed, according to Mr. Brainard's recollection there was a bequest, not in favor of the complainant, but his son (Rec., p. 71).

Again we invite particular attention to the testimony of William A. Cook, as to what took place in his office when Piper and Hay came there together for the purpose of having a will executed by Piper, which should give to Hay the lot on Corcoran street, which had then just been purchased by Piper. After Mr. Cook had testifed that Piper told him to prepare a will vesting the title to that property absolutely in Hay, the witness was asked by Hay's counsel to state what reasons Piper gave for making such a will, and he replied:

> "He told me that Mr. Hay as well as Mrs. Hay had been peculiarly kind and good (to use his own expression) to him, and that he felt it was only his duty to make a proper return to Mr. Hay, and that he desired to vest the title to the property in Mr. Hay" (Rec., p. 173).

Certainly this was the language of one who was about to confer a favor, and not comply with an obligation.

Mr. Justice Shepard (Rec., p. 324) lays a good deal of stress upon the testimony of James Schouler and his wife. But the testimony of these witnesses is very unsatisfactory (Rec., pp. 50–55). Mr. Schouler said that his imperfect hearing prevented him from engaging in general conversations, and that the impression which he got was formed in a large part from letters from Mrs. Piper to Mrs. Schouler, and from what Mrs. Schouler told him of her conversations with Mr. and Mrs. Piper. It is manifest throughout his entire deposition that pretty much all his information on the subject is through this double hearsay. This, taken in connection with the fact that he was so deaf that he could not

engage in ordinary conversation, would seem to make his testimony a very uncertain foundation for such a structure as has been erected upon it. As to Mrs. Schouler, all her information came from Mrs. Piper. She says: "I do not remember that Dr. Piper made any statement as to the disposition of the house." True, in the very next sentence, she says:

> "I have no doubt but that Dr. Piper informed me of the existence of this arrangement, but I do not remember just when" (Rec., p. 53).

But the arrangement, as Mrs. Schouler understood it, was not the contract sued on, because she says that arrangement was that Mr. and Mrs. Piper—

> "were to live with the Hays for the remainder of their natural lives, and that upon their death the house was to go to '*the Hays*,' and that they had made their wills to that effect" (Rec., p. 53).

On cross-examination she repeats, "that the house on Corcoran street was to go to Mr. and Mrs. Hay" (Rec., p. 55).

When it is remembered that at a time when there was no contract or arrangement of any kind between Piper and Hay—January 14, 1886,—"Father and Mother Piper" had written to "Darling Edwin and Florence" that the Doctor had made a will with Mrs. Piper's full approval, bequeathing to Mr. and Mrs. Hay nearly the whole of Piper's property (Rec., p. 180), it will readily be seen how easy it was for Mrs. Schouler and other witnesses to misunderstand casual remarks made by Mrs. Piper, or her husband, referring to this voluntary act on their part.

Hay's delay in taking any steps to enforce the alleged parol agreement should be taken into consideration in the disposition of this appeal. He had notice at least as early as January 5, 1893, that Piper did not recognize that he

was under any obligation to devise any part of his estate to him. In his letter of that date to Hay, Piper says:

> "You had better go slow in our business affairs. If I die without a will, my property goes to my brothers and sister. They, the brothers, are keen business men and will contend every inch" (Rec., p. 206).

Yet, for nearly four years from that time he took no steps either towards having Piper put in writing what he, Hay, claimed was the contract between them, or bringing any action or proceeding at law or in equity, to assert his claims either against Piper or against the property.

During the Chicago Exposition of 1893, Mrs. Schouler called upon Piper at Thomas' house and found him, as she says, "very feeble mentally and physically" (Rec., p. 55). It was through Mrs. Schouler that Piper's sister, Mrs. Whitney, learned of the death of Mrs. Piper at Saratoga (Rec., p. 56). By an anonymous letter, Piper's brother at Exeter, was notified that Dr. Piper himself was ill at Saratoga (Rec., p. 57). Mrs. Piper herself wrote to Mrs. Whitney from Saratoga about her husband's condition (Rec., p. 56). From all these things Mrs. Whitney became very much worried about her brother and at her instance, her daughter, the appellant Miss Whitney, on three different occasions came to Washington to get information as to Dr. Piper from Hay (Rec., p. 57). On both the first and second visits she testifies that Hay told her that he expected her uncle home any day—that he might "come home tonight or tomorrow" (Rec., p. 57). She further testifies that on her third visit Hay told her of Dr. Piper's condition in Chicago, whereupon she told Hay she would go to Chicago for him and bring him home (Rec., p. 57). She accordingly went to Chicago with a letter from her mother in which her mother asked her brother to come and spend the summer with her. This offer the Doctor accepted and Miss Whitney took him home to Newport (Rec., p. 57). She offered to take him to

Newport by way of Washington, stopping over at Washington, but the Doctor said that he preferred to go directly to Newport (Rec., p. 57).

It is singular, to say the least, that Miss Whitney had so little difficulty in accomplishing what Hay had failed for three years to bring about, getting Piper out of the "clutches" of Dr. Thomas.

Piper was now in the hands of those who were his natural protectors. They were among his next of kin and might reasonably have anticipated that after taking care of him during the remainder of his life, an interest in his property in Washington would devolve upon them by operation of law. In this situation and under these circumstances they undertook to take care of him. Hay, by his failure to act, had led them into this situation. Indeed, by executing and sending to Dr. Piper the lease of October 20, 1893, he had put it in Dr. Piper's power to convey to his relatives what was undoubtedly the Doctor's own understanding, and that was, that at this time Hay had no claim upon the Corcoran street house, except as a tenant under that lease. Therefore, even if no deed had been made to that house by Piper to Miss Whitney, Hay would have had great difficulty, as against Miss Whitney and her mother at least, in excusing his long delay to assert the claim which he now makes to the property.

We conclude this brief with a reference to our assignments of error and to a few of the leading cases on some of the points of law involved in the case.

The first assignment of error is sustained. On the whole evidence the complainant has failed to prove his case. He is in a court of equity. He has required and obtained answers under oath, and such answers in any case must be

overcome by clear proof. He asks specific performance of a contract. Every complainant in such a suit must establish the contract he sets up by cogent evidence.

Purcell *vs.* Minor, 4 Wall. 513.
Williams *vs.* Morris, 95 U. S. 444, 456.
Hennessy *vs.* Woolworth, 128 U. S. 438–442.
De Lollar *vs.* Hanscome, 158 U. S. 216–222.

In this connection, the language of this court in Nickerson *vs.* Nickerson, 127 U. S. 668–677, is quite pertinent.

> "Their evidence, in connection with all the circumstances of the case, especially the lapse of time, should be regarded as establishing, at most, only an honest belief and expectation upon the part of the appellant and her mother, before and at the time of the marriage, superinduced by the general conduct or loose expressions of the defendant, that he intended, at some time after marriage, to provide his wife with a permanent home out of the proceeds of the sale of the Portland property. It is the case of a husband, who, prior to marriage, induced in the mind of his intended wife expectations in reference to real property which, after marriage, he failed to meet, but in respect of which property he did not enter—and, perhaps, intentionally refrained from entering into any distinct and binding agreement."

The second assignment of error is also well taken. Even if the court could see that Piper made *some* agreement with Hay as to the disposition to be made of the house in question on his, Piper's, death, he has failed to show that that agreement was to devise it in fee to him. Nor is there any certain evidence as to just what Hay was to do as his part of the alleged contract. And where there is any reasonable doubt as to whether all the terms of the alleged agreement are before the court, specific performance will be refused and the complainant left to his remedy at law.

Colson *vs.* Thompson, 2 Wh. 336.
Dalzell *vs.* Dueber Manfg. Co., 149 U. S. 315–326.

As to the third assignment, it would seem to be especially strong. To avoid the Statute of Frauds the complainant relies upon his being in possession in part performance of the alleged oral agreement. But that possession is seen to have been held for nearly three years before the suit was brought under a written lease. Having retained possession under that instrument he can not be allowed now to claim that he is in possession under a different and wholly inconsistent agreement.

Ham *vs.* Goodrich, 33 N. H. 38.
Halston *vs.* Railroad Co., 51 Ga. 199.
Wood *vs.* Thornly, 58 Ill. 465.
Purcell *vs.* Minor, 4. Wall. 513.

Our contention in this regard has been misunderstood by the Court of Appeals (Rec., pp. 320–321). We are not asserting that in such a case it must be proved by direct evidence that the taking possession was under the very contract sought to be enforced. It may be sufficient to show that it was taken under some agreement between the parties and then establish by other evidence what was that agreement. But here we claim that since Hay admits that he signed the lease for the very purpose of enabling him to hold possession (Rec., p. 214) he must get out before he can set up the claim that by a contract between him and his landlord antedating the lease the landlord had divested himself of the power to control the property. No case so strong as this has come to our notice; but the cases above cited show that a possession held under some arrangement other than the one which the occupant seeks to enforce can not be treated as a part performance to take the case out of the statute.

The fourth error assigned relates to the admitted fact that for about four years before the bill was filed, and for five years before Piper's death, Hay did not support him.

Piper boarded with Hay only four years and a half. Hay does indeed claim that this was not his fault—that he was always ready to do his part. But certainly, there must be some point of time in contracts of this kind, at which, for a violation of it, the injured party's remedy would be by an action at law and not by a suit for specific performance.

See, on this point, Cox *vs.* Cox, 26 Gratt. 308.

The fifth error assigned is closely related to the fourth. Where the consideration of a contract is personal services to be performed by one of the parties, it can not be specifically enforced. As to the one party, the court will not undertake to compel him to render the services; and as to the other, he must fail, because unless the remedy is mutual equity will not interfere.

Rutland Marble Co. *vs.* Ripley, 10 Wall. 339–358, 359.

When all the services have been rendered—as in a case like this when the party who is to be benefited by the services is dead—the objection does not apply. But since during the period from August, 1892, when Piper went to Saratoga, till December, 1896, when this bill was filed, Piper could not have compelled Hay to "take care" of him, but would have had to resort to an action for damages, it is but just that Hay should be confined to the same remedy.

Lastly, the sixth assignment is based upon Hay's laches in bringing the suit. This depends upon principles so well settled in this court that no reference to the cases is required.

We respectfully submit that the decree below should be reversed and the courts below instructed to dismiss the bill.

B. F. LEIGHTON,
A. S. WORTHINGTON,
Solicitors for Appellant.

APPENDIX.

MEMORANDA OF TESTIMONY.

The terms of the alleged contract must be gathered from the testimony of numerous witnesses who depose to statements made to them at different times by the said Richard U. Piper and to the conduct of the parties thereto as observed by them, and from correspondence between appellee and the said Richard U. Piper. Following is a summary of said testimony and correspondence, so far as the same relates to the alleged contract, containing numerous literal quotations, submitted to aid the court in examining the same, and as tending to show that the intention which Dr. Piper at one time entertained of giving his property, or part of it, by his will to the Hay family was a mere voluntary undertaking on his part, and, further, that there never was such certainty and definiteness as to the way in which he was to benefit the Hay family as to enable a court to specifically enforce that intention, even if it had been the outgrowth of a contract based upon a sufficient consideration.

Edwin B. Hay, the complainant below, testified at great length in his own behalf, his testimony, with exhibits, covering pages from 176 to 298 of the Record.

He states that he first became acquainted with Dr. Piper in the year 1882 when they were both engaged for a period of six weeks in attendance on a trial at Yankton, Dakota, in which they participated as expert witnesses in the matter of handwriting; that the attachment between Dr. Piper and witness became at that time very great, and that upon the conclusion of the case witness stopped over at Chicago, to call upon Mrs. Piper, the Doctor's wife, whom he then met for the first time. In the year 1883 witness again met the Doctor and his wife at a trial, this time at Philadelphia,

where the Doctor and witness were engaged for many weeks (as expert witnesses), and upon the conclusion of that case Dr. Piper and Mrs. Piper made a visit, which extended over six weeks, to Hay, at the latter's home, 1535 P street, N. W., in Washington. Relative to this first visit, Mr. Hay deposes:

"They seemed very much delighted with the home and the home life, and suggested that they would like very much to spend the balance of their days with us; that they would be glad to treat us as their children; . . . that if we would consent to do so, he (Dr. Piper) would be willing to build a larger house in which we could live together; the proposition was not considered favorably at all, but on the contrary it was declined" (177, 178).

On January 14, 1886, the Pipers wrote a letter which they signed "Father and Mother Piper" to the Hays, whom they addressed as "Darling Edwin and Florence," which letter contained the following:

"You will appreciate, dear ones, the estimation in which we hold you when I tell you that I have today written a will from the Doctor's dictation, and with my full approval, in which we bequeath to you the whole of our property, with the exception of a few legacies amounting to about $500"

The letter then gave detailed information as to where this will was deposited (180).

Subsequent letters from the Pipers at Chicago to the Hays in Washington refer directly or indirectly to a will in which Hay was executor, as being still in existence (181, 182, 183, 184).

Prior to March, 1887, the Pipers renewed their proposition that they come to Washington to live with the Hays, and to this the Hays finally agreed (184).

Q. (By plaintiff's counsel). "Under what conditions or arrangements did the Doctor and his wife come to your house at that time?"

A. "Pursuant to the conversations we had had and the communications that had passed between us prior to their arrival, they came to live with us as a mother and father would come to live with children, and their dwelling with us was conditioned upon a covenant and agreement entered into that in consideration of permitting them to reside with us in this relationship during the balance of their lives and the services and care to be given to them, that he would build a house in the City of Washington, District of Columbia, in which we should live together, and that at his death, not only the house, but all of his property should be willed to me. (Objection.) And Dr. Piper further stated that should I be taken away that he would provide for Mrs. Hay and the children as if they were his grandchildren and she his daughter, and that should both of us be taken away during his lifetime, that he would likewise provide for the children, and that he would rear and raise them, and upon this Mrs. Piper and Dr. Piper, Mrs. Hay and myself shook hands, and the Doctor himself called upon Heaven to witness the sincerity of the agreement" (184, 185).

Being further asked by his counsel whether he had made any preparation for the reception of the Pipers before they arrived, witness answered that "realizing that this was to be a lifetime affair, and as all their written communications had proved that they had done so much for us," it necessitated the expenditure of considerable money in furnishing apartments for Dr. and Mrs. Piper (186).

As to his visit in company with Dr. Piper to the office of William A. Cook, Mr. Hay testified that immediately after Dr. Piper had purchased the lot on Corcoran street, upon which the new house was afterwards built, "the Doctor, then faithful to his covenant, was as willing to make the will to devise this property to me and as eager to do so as he was to purchase the lot, and insisted upon going at once (saying that we did not know what might happen) to consult an attorney with a view to making a will to cover this and all

of his property. . . . We detailed the entire circumstances of our relationship to Mr. Cook, and set forth exactly what the Doctor desired, and upon this memorandum or details of a will, Mr. Cook, as I am informed, made a will in accordance with our desire. . . . So he instructed Mr. Cook in my presence to make a will including this property in the District of Columbia, 1512 Corcoran street, and the lots upon which it stands, and all of his property wherever situated, especially naming that in Chicago, and devising all of the same to me in trust for his wife, and at her death to belong to myself, my heirs and assigns, forever" (190). Witness states further that Dr. Piper informed him that the will had been prepared in accordance with these instructions, executed, and deposited in a safe deposit company; witness supposes that this will was afterwards taken from that repository by Dr. Thomas on an order from Dr. Piper when the latter was living with Dr. Thomas in Chicago, after the death of Mrs. Piper (190).

Relative to the completion and occupation of the Corcoran street house, witness says (page 192) "the house was finished so that we moved in on or about the first of August, 1888, and possession of the house was turned over to us by Dr. and Mrs. Piper, and myself and my wife have been in possession ever since."

Prior to the completion of the house, while the Doctor was away in Cleveland in a case, witness received a letter from him, dated January 19, 1888, in which was the following: "You little know, I think, how good a letter from you seems to me, though but a little way from you, and if I could or should put in words all the love I feel towards you and Flora, and indeed, the children, I am afraid it would seem extravagant and perhaps unreal, and I must therefore be content to endeavor to show it in acts as time goes." "For Son Edwin" (192).

During the time the house was in process of completion Dr. Piper and witness were there together almost every day.

"Not only would Dr. Piper comment upon the builders and the method of building, but likewise upon the occupation of it together, anticipated by the Doctor and his wife. He felt proud of the fact, as he expressed it to me, and told anybody and everybody that he was building the house for 'My Son Edwin,' as he would speak of me both in my presence and in conversation with others in my hearing" (192).

It was intended originally to heat the house with furnace, but the contract in this respect was altered, at witness' request, as he was advised that steam heat was more economical in the long run, and a steam-heating plant was put in, and witness paid the difference in price amounting to $1,000.00, "of which the Doctor gave me three hundred and some dollars" (193). Witness states further that he also paid for putting in the chandeliers (about $300 or $400) and for the mantels (about $300), and that he afterwards gave receipts to Dr. Piper covering the amounts thus expended for chandeliers and mantels, by way of an allowance to the Doctor or contribution on the house, but that no money actually passed from Dr. Piper to him, and he was not reimbursed in any other way. His intention was to release the Doctor by giving these receipts for any claim for reimbursement (194).

Q. "About how many years did this living together of yourself and Dr. Piper continue? A. Six years." [Note: This includes nearly two years spent in the P street house before the Corcoran street house was built, as the latter was completed in August, 1888, and Dr. and Mrs. Piper left for Saratoga never to return in August, 1892. See page 200.]

During all this period, Mr. Hay testifies that he paid every expense of every kind and nature relating to the joint household or family, including gas and coal bills, and also that he paid the taxes on the Corcoran street house "from the time the house was built, up to the present time with the exception of the last half year's taxes."

Witness states in detail (pages 197–200) that the relations

of the Pipers and his own family continued of the most kindly and affectionate character, the former being entirely contented and happy in the home life, and that when Dr. and Mrs. Piper left (as it turned out never to return) for Saratoga, August 26, 1892, the most cordial relations between all parties existed, and that the object of the visit to Saratoga was to benefit the Doctor's health, and witness fully expected them to return to the home in a few weeks; that they had been on a visit to Saratoga once before (in 1891).

Q. "After the time spent at Saratoga did the Doctor recover from his ailments?" A. "The Doctor seemed not to get any better than he was when he went away. From the letters we received it appeared that the Doctor was improving today and down tomorrow. This necessitated the continued attention of Mrs. Piper upon him from morning to night, which finally broke her down" (p. 201).

"For some time after they went to Saratoga the letters were written by Mrs. Piper and the Doctor almost every day, until finally Mrs. Piper was taken sick and the Doctor became very much worried. We were interested in the collection of a claim against the Sharon estate, and his mind ran very much towards that money. The last letter ever written by Mrs. Piper was dated November 20, 1892, in which she complains that her handwriting is not as good as usual, because of her feebleness; but the Doctor upon November 30, wrote a letter in which he speaks of the claim against the Sharons and says in conclusion:

"If we do not get well and strong we shall of course expect you to come on and help us in going home. With much love, Father PIPER. Son Edwin." (P. 201). Letter in evidence, Exhibit E. B. H. 25.

Later Dr. Piper telegraphed witness to come on, and he complied (201). While at Saratoga on this occasion, witness, as amanuensis, wrote a will for Dr. Piper, from his dictation, Dec. 6, 1892, in which the Corcoran street property

and the Chicago property, and all his property with the exception of a few bequests, was devised to witness (203). [Note: This is the same will referred to in testimony of Mr. Hine as having been later rescued by him from a slop jar into which it had been thrown, after being "torn up," and is, in a mutilated condition, annexed to his deposition (Record, 82).]

This will was made, as witness states, in contemplation of the approaching death of Mrs. Piper, who was a beneficiary for life under former wills. Mrs. Piper died on January 3, 1893 (204), and witness went on to Saratoga and brought the remains to Washington, where they were interred. Dr. Piper was not sufficiently recovered to accompany witness, and remained at Saratoga ill, and "in a wild condition" brought about "by the death of his wife and by an over-injection of morphia, as I understand. I don't know that, but that is what they told me. He was very much disturbed at the loss of Mrs. Piper, though that did not seem to be the burden of his thoughts; it was 'money, money, money,' and that he was being robbed" (205). Witness visited him while in this condition to assist him home, and found in Saratoga Dr. G. S. Thomas, of Chicago, the agent who managed Dr. Piper's property there. Dr. Piper still insisting that he was not able to travel, witness returned to Washington, and a few weeks after learned that Dr. Thomas, "in the most cruel and shameful manner had carried Dr. Piper out of his bed to Albany and thence to Chicago."

Before the advent of Dr. Thomas, however, in fact the same day in which witness left Saratoga for Washington with the remains of Mrs. Piper, Dr. Piper wrote the following letter, dated January 5, 1893 (Ex. E. B. H. 31):

"DEAR NED: You had better go slow in our business affairs. If I die without a will my property goes to my brothers and sister. They, the brothers, are keen business men, and will contend every inch. You have no right to set a watch over me so that none of my friends can call on

me. Once for all, do fair by me, you will get all right. Remember also that it will be no use to come here until the Doctor will say it is best for [you] to come. R. U. PIPER." (206).

[Note: The Doctor referred to is the attending physician. It is evident that Dr. Piper had destroyed the will of December 6, 1892, by tearing it and throwing it away before he wrote this letter].

On January 9, Dr. Piper again wrote: "In reply to yours of the sixth, I repeat what I said before, that I can not be moved until I can sit up in bed at least; and that when you send me what is due from the Sharon estate, I will make a will in your favor. Dr. Thomas has just written me offering to take charge of the whole matter, so that the property goes to him or to the public. It don't matter which. I will add here truly, I would rather it would go to you than any one else. R. U. PIPER." (P. 206 and Ex. E. B. H. 32).

On January 12, 1893, the Doctor, still at Saratoga, writes, "better have all things square." (207).

Piper left Saratoga for Chicago in the charge of Dr. Thomas, January 25, 1893. (208).

[It was during his stay in Chicago at the home of Dr. Thomas that Dr. Piper executed the deed in trust to Moore, trustee, of which the complainant speaks in his bill, and which was, before the filing of the bill, released as to the Washington property, and was declared a fraud on Dr. Piper and consequently void by the Chicago court].

Witness is shown the lease or copy of lease between Dr. Piper and himself of the Corcoran street house, dated October 20, 1893, being "Defendant's Exhibit C," and is asked by his counsel whether he signed it and the circumstances under which it was executed, etc.

Answer: "I signed the paper. It was upon the importunities of a letter from Dr. Thomas, purporting to be from Dr. Piper, stating that his rents were not coming in very rapidly, and that he was somewhat under expense, having

to pay his board, and asking if I could be of any help to him in the way of an allowance. Realizing the situation of Dr. Piper, and not knowing what might be done by Thomas to rob both Dr. Piper and myself of a home, and wishing to make an allowance to Dr. Piper, to which he was entitled, I signed this lease, knowing that whatever might occur it would hold me in possession of the property at least during its existence, and that before that time the adjustment of the matters by Dr. Piper and myself would be consummated, looking to his return home and his continuing with us in accordance with our agreement. I complied with the terms of the lease after it was signed by me, and I never denied the right of Dr. Piper to have an allowance made to him, if he so desired it." So much of this answer as is consistent with the terms of the lease itself was objected to by counsel for defendant as incompetent and irrelevant (214).

At the same time this lease was sent to witness for execution, a general release of all claims "growing out of any agreements or transactions heretofore had between said Piper and myself," and stating that witness had no claim or interest, other than the leasehold interest under the lease of even date, in house 1512 Corcoran St., Washington, was forwarded with request that witness would sign and return it to Dr. Piper. This witness did no do, and he states that Dr. Piper afterwards told him that the whole matter of the lease was a scheme of Dr. Thomas (216–7). Nevertheless, witness states (page 217), "I received a letter from Dr. Piper himself, under date of April 9, 1894, in which speaking of the receipt (release) which I have already stated I refused to sign, he says:

"You seem to have forgotten that I sent you a receipt gotten up by the judge, which you were to sign and return. I don't see why you can not please me in this by doing as I have several times requested. You know I have treated you finely in my will. Perhaps I have already done more

for you than I ought. R. U. PIPER." (Exhibit E. B. H. 51).

On July 29, 1894, Piper wrote to Hay from Chicago, "As I have before told you, I have left you in my will many times the whole rent" (217).

Dr. Piper remained with the family of Dr. Thomas in Chicago until the appellant, his niece, learning from witness that he was unhappy there, etc., went to Chicago for the purpose of bringing him back to Washington, but on arriving there arranged with Dr. Piper instead to take him to his sister's (appellant's mother's) home in Newport, Maine (218), where he was at the time of the bringing of this suit, and where he died.

Witness visited him there and corresponded with him, urging him to return to his home in Washington, the Corcoran street house, in which witness still kept his rooms unoccupied, awaiting his use of them. Appellant called on appellee during this period, and at one time the latter suggested that he would like to make some use of these rooms. Dr. Piper wrote, partly in reply to this suggestion or request, December 18, 1895, "It is better for both of us not to have any misunderstanding between us. Anna informs me that you would like to use my rooms. You can do so until I otherwise advise you, if you will pack all my bric-a-brac and all the little things in the room, and put them in the closet and lock them up. R. U. PIPER" (222).

Witness accordingly has since made use of the rooms, complying with the directions contained in the letter.

When witness learned from the land records that Dr. Piper had made the deed which is in evidence, of the Corcoran street property to appellant, witness immediately wrote to the Doctor in regard to the matter, in reply to which Dr. Piper wrote under date of October 23, 1896:

"DEAR NED: Your letter of the 20th inst. just received. Now, as to my affairs, it does not seem to me that I ought to consult you in regard to giving my niece my Washington house. She has been and is like a daughter to me, and has

done all my business for nearly two years. Now, as for the agreement about my boarding with you while you was in my house, you was to pay me $200 a year, furnish board for myself and wife, etc. Now, as I have not been there for some four years, I think you would be willing to pay me a fair equivalent for our board during the time. Since I have been acquainted with you I have always had a friendly feeling for you and have tried to help you all I could. I appreciate your kindness me, but are we not on a par in that respect? Would you like to rent the house again after your lease expires? If so, you shall have the first chance. R. U. PIPER" (224).

Questioned by his counsel, witness denies that there ever was an agreement such as stated in this letter by which he was to pay Piper $200 a year. "The only payment that I agreed to make to him was in the so-called lease by which he was given a allowance" and this was after the death of his wife (224).

As to his cross-examination on this point, see R. 234–5, where he admits passing receipts of $50 each quarter while the doctor lived with him. Witness also produced on his direct examination the mutilated and torn will before referred to as annexed to the deposition of Mr. Hine, and defendant's counsel objected to its introduction (227). He also produced another paper purporting to be a will of Dr. Piper, signed by him but not witnessed, which he states was found in a drawer in the Doctor's room in the Corcoran street house after he had gone to Saratoga, together with a paper purporting to be a will of Mrs. Piper. By the terms of this instrument, in case of the death of Dr. Piper's wife before his own death, he bequeaths $2,000 to his sister, Victoria A. Whitney (appellant's mother), $500 to his brother in law, John P. Heywood, and the residue of his property to appellee (228).

Relative to this matter of wills he admitted on cross-examination that Dr. Piper made a will while in Washing-

ton, before leaving for Saratoga, of which witness knew nothing at the time, and on redirect examination (page 260) he says: "I heard of it accidentally from a gentlemen in the city of Washington, Mr. Brainard, and learned of it about the time of the institution of these proceedings, in December, 1896, or January, 1897."

This is the will referred to in the testimony of Mr. Brainard (66), who was produced as a witness on behalf of defendant.

When cross-examined in reference to the visit to Mr. Cook's office, Mr. Hay testified that when the will drawn by Mr. Cook was made, it was suggested that a deed be given by Dr. Piper instead of the will; that that *may* have been suggested by witness; that Piper stated that he would prefer to make a will; that he, Piper, did not believe in one parting with his property during his lifetime, and for a further reason that it would be better for Mrs. Hay and the children, and for Hay himself, if he, Piper, retained the property in his own name, as he could go upon a bond for Hay, or if Hay became embarrassed financially, the property would be in Piper's name, and could not be disturbed, and that he could better care for Mrs. Hay and the children if Hay was taken away; that Piper had stated to the witness in so many words, "that if Edwin should be taken away that he would take care of Mrs. Hay and the children and that if she were taken away, that he would likewise care for and rear the children, and at his death leave the property to them (243, 244).

As late as the 20th of October, 1896, Hay wrote to Piper, at that time with Miss Whitney in Newport, Maine, as follows: "I have observed also of one further step in your affairs in the recording of the deed to Miss Whitney. I will not comment upon that at this time, but our relations are such that it seems to me that you might have consulted me upon the matter prior to taking such a step. In all of our relationship I have done to you only what kindness and

affection has prompted, and have faithfully carried out my part of the sacred contract, and while I do not for a moment wish to come between you and your good sister, still there are tokens of affection between you and me which should not be slighted off" (255).

On the 11th of November, 1896, Hay again wrote to Piper: "This is the second attempt on your part to dispose of the property both here and in Chicago, so you had better advise your niece of the exact situation. . . . I will hold the house as before, trusting to keep our arrangements agreeable to you in every particular" (255–6).

On his redirect examination Hay testified in reference to the home on Corcoran street that "the Doctor suggested that, as he had invested considerable money in the building, that it would seem proper to make him some allowance on account of the large investment for the home. Not wishing to make any formal agreement concerning that, the Doctor was satisfied that we should liquidate the amount of the indebtedness between us in the way that has been suggested which pleased him very much and was no hardship to me, and therefore it was done" (261).

On the 11th of November, 1896, Hay wrote a long letter to Dr. Piper, from which the following extract is made:

"Your leaving for a visit was with the full intention of spending away a few weeks, and then returning to your home, and, as a token of your good will and faithfulness to the obligation, you did, of your own free will and accord, uninfluenced in any way and with sincere loyalty on your part, as a last act, make a last will and testament (confirmatory of several others that you made in the same direction) devising to me the property not only here but also in Chicago, which I appreciated as being an evidence of the recognition of our relationship and an overt act of your affection for me" (291).

In Mr. Hay's cross and redirect examinations he states that the cost of the Corcoran street property was about

$21,000 (248) and that Dr. Piper paid for the entire property—land and building—with the exception of the amounts paid by Hay for the mantels and chandeliers and expense caused by changing from furnace to steam heat, and that part of these payments made by Hay were reimbursed him in cash, and part by receipts and by credit on what witness calls an allowance from him to Dr. Piper of $50 per quarter, and that a part was not reimbursed at all (237). "The Doctor was punctillous in those things and insisted in having some settlement by which he could feel that he had paid for everything in the house" (237). That Mrs. Whitney, appellant's mother, was the only relative of Dr. Piper of whom he always spoke with affection, and with whom he corresponded while living with Mr. Hay (230).

In addition to complainant twenty witnesses were examined on the part of appellee. The testimony of these witnesses is referred to below in the order in which the same appears in the printed record, except as to the depositions of G. S. Hine and Miss F. E. Hine, which relate exclusively to occurrences in Saratoga as late as the year 1892, and are therefore mentioned last.

James Schouler, of Boston, testifies that he first met Mr. Hay and wife in the spring of 1888 and has known them since quite intimately; that he knew Dr. Piper since about 1873; that the Doctor is a connection by marriage, being a second cousin of his wife; that he saw Dr. Piper in Washington for about a month each year from 1888 to 1892, when witness would call at the Corcoran street house.

"I recall no special conversation material to this controversy at any time. My imperfect hearing prevents general conversations, and I remember no special conversation upon this subject" (51). He proceeds to testify to an impression formed from hearing letters of Mrs. Piper to his wife, read by the latter and from what his wife would tell him of her conversations with the Pipers. This testimony is, of course,

not admissible. He understood from Dr. and Mrs. Piper's statements that the Corcoran street house was built as a common home for themselves and the Hays, and there seemed to be perfect confidence and affection between the parties, and they seemed to be members of one household (51).

This testimony was taken on deposition, and, in answer to cross interrogatories, but without giving dates or source of information, as requested, he states that he understood that the house was built expressly for the Pipers and Hays to live together during the lives of the old people and then to go to Mr. Hay and his wife in consideration of giving Dr. and Mrs. Piper a home; that "he (Piper) gave me to understand that the arrangement was to continue during life. I knew nothing of what was to be paid or the terms of board, but understood it was not optional for either party to terminate the arrangement without the consent of the other" (Rec. 52).

Emily F. Schouler, the wife of the preceding witness, states that she visited Washington every year from 1888 to 1892, and saw Richard U. Piper, her second cousin, at his home and at her hotel very frequently.

"Dr. Piper did tell me something about these matters, and I understood that the house on Corcoran street was built for the joint use of Mr. and Mrs. Hay and Dr. and Mrs. Piper; that they were to occupy it jointly as one family during the lives of the Pipers." She also testifies to more detailed statements as to the alleged agreement made to her by Mrs. Piper, which statements are subject to the objection, made by defendant's counsel, that it is not shown that Dr. Piper was cognizant of or authorized them, as well as the general objection that they are not admissible under the Statute of Frauds, which objection applies also to all the oral statements of Dr. Piper relating to the real estate in controversy and is discussed in another part of this brief.

In answer to a cross-interrogatory, she says: "I know nothing of any dollar or cents arrangement in the matter, but I do know that Dr. and Mrs. Piper were to live with Mr. and Mrs. Hay during their natural lives, and to be taken care of as their parents, and at their death the house on Corcoran street was to go to Mr. and Mrs. Hay" (54 and 55).

Louis Kaufman testifies that he was formerly in the clothing business, and often talked with Dr. Piper between the years 1887 and 1892, when the latter would come to his place of business in Washington, accompanied by Mr. Hay, to order clothes or have some fitted. Piper told him he had adopted Mr. Hay. Would say, "He is my boy—I am living with Ned. He is my boy, and I am going to build him the house; said that Ned was to take care of him for that, and he was to leave him this house" (85).

On cross-examination: Q. "He didn't tell you what Hay was to do for him, except in that general way that Hay was to take care of him?" A. "No, sir." Q. "Didn't say whether that meant to board him or not?" A. "I don't know of that. He would talk with me in the store, and he said that he had adopted Ned as his son, and he was going to leave him this piece of property, and that he was to take care of him for it. What he was to do, I don't know. I never went into his affairs" (87).

Albert T. Coumbe is a real estate agent and testified that he has occupied the same office with Mr. Hay for the past fifteen years, and knows him very intimately; that Dr. Piper consulted him about purchasing land on which to build, and that he afterwards purchased the Corcoran street lots against his (witness') judgment; that after the Doctor started to build the Corcoran street house, witness went a number of times to see it and talked with the Doctor about it. "Of course, I felt a little interest, because I knew the house was being built for Edwin and Florence, as he called them." "He seemed to have the greatest affection for Ed-

win and Florence, and he told me a number of times that he was building that house for Edwin and Florence" (89). (On cross-examination) "It was told to me a number of times by Dr. Piper that they were going there to live as one family. The Doctor told me time and again that they were to live there as one family, and that Edwin was to have his house at his death" (91). Q. "Because of that affection which existed, he told you he was to give him that property?" A. "Many times; and, of course, that was understood by everyone." Q. "And it was because of his affection that he was going to give Edwin this property?" A. "That was what he was building it for." Witness always considered Dr. Piper "a very brilliant and smart man, a very intellectual man. All the time that I knew him he had the brightest mind. He was a scientist and took great interest in scientific matters. I considered him a bright man" (92).

George A. Darling. Piper said, "It is a large house, but I am building it for Edwin and Florence, and they are going to live here, and we are going to live with them, and it takes quite a large house to accommodate all of us. It is to belong to Edwin and Florence, and we want it large enough to start with—it was a common expression to hear him speak of the home as Florence's and Edwin's" (94).

On cross-examination the witness said that Piper did not tell him what the arrangement was between him and the Hays, except that the house was built for their joint accommodation and use, and that he, witness, knew what the arrangements between the parties were only by hearsay (97).

Julia F. Darling. Mrs. Piper, several months after the Pipers and the Hays occupied the new house, said something to the witness about her dining room in that house, "and then, as if reconsidering what she had said, remarked, 'I say my dining room. Of course this is Florence's house, but they are our children; we are all one, and this is our home'" (101).

Witness said also that Dr. Piper spoke of it being Edwin's house; "that the house was Edwin's, and that they could have the rest of the house as they liked, and that he was going to regulate his rooms as he liked" (101).

MRS. MULLETT. This witness is the widow of the architect who prepared the plans for the new house and superintended its construction. Mrs. Hay had the principal say about what was to be done here and there. The Doctor would not say anything, but would send Mr. Mullett to her. He would say, "This is being built for Edwin and Florence, and whatever they wish, have it done" (105).

"Both Mrs. Piper and the Doctor gave me to understand that they were building this house to be used by the Doctor during his lifetime, and afterwards to belong to Mr. and Mrs. Hay" (106).

On cross-examination Mrs. Mullett said that she understood from what the Doctor said to her that the house was being built so that they could all live together; that it was for Edwin and Florence; that they should have it at his death; and that made witness believe that Dr. Piper was to live there as he would with a daughter and son. That is what Dr. Piper gave her to understand (110, 111).

THOMAS A. MULLETT, son of the architect, does not testify to any knowledge or information as to the alleged agreement.

WILLIAM E. MCLEAN. Witness, in talking to Dr. Piper, made some reference to the house being such a large one, whereupon Dr. Piper said it was none too big; "that Edwin and Florence had several children, and that he and his wife were going to reside there; that the house was built for all of them" (118).

DR. G. WYTHE COOK. Testifies that he visited Dr. Piper and the Hays professionally and also socially at the Corcoran street house; heard Dr. and Mrs. Piper both say that Mr. and Mrs. Hay were their children, and "that they were

to have their property." Dr. Piper told witness that he met Hay in a case in which they were both expert witnesses; told witness how pleased he was with Mr. Hay then, and how he came to be attached to him; how he came to Washington and made the Hays a visit; and how they had agreed to live together—never went into any particulars about it, but just a statement to that effect" (123).

On cross-examination witness stated that he heard Dr. Piper refer to the Hays as his children—he heard the Doctor refer to Mr. and Mrs. Hay as his children, and speak of his property in this way so often—witness's supposition was that the proposition to give Hay the property grew out of the regard that Piper had for the Hay family (125).

W. T. KEENAN. This witness was the builder who had the contract for erecting the Corcoran Street house. Dr. Piper told witness that he was building the house as residence for himself during his lifetime; that he adopted Mr. Ed. Hay and his wife as his children, and that at his death this property would go to them; Piper said that he was doing that for his children—witness thought at first it was Mr. Hay's children, until Piper told him it was Mr. Hay and his wife (128, 129).

On cross-examination witness said that he inferred from his various conversations with Dr. Piper that it was because of his affection that he had adopted the Hays as his children, and that he was building this house as a joint home for them and proposed to leave it to them as a gift. Being asked whether it was a pure act of friendship on Dr. Piper's part growing out of his affection and love for the Hays, witness said, "Well, he did not go into details, but I remember he said that he adopted them as his children and at his death the property would go to them" (130).

On redirect examination, being asked if Dr. Piper did not say at the same time that Hay and his wife were going to take care of Dr. Piper and his wife during their lives,

the witness answered, "I don't know whether I used that word 'would take care of,' but they were going to live with them" (131).

PETER S. KEMON. Dr. Piper told witness, as near as witness could call to mind, that Hay and his wife were practically adopted by them, and the home was one that was erected for the benefit of Mr. and Mrs. Hay, and that they were to live with Mr. and Mrs. Hay during their lifetime, and that the property was to be Mr. and Mrs. Hay's. Witness did not know but that the house was being built by Mr. Hay until Dr. Piper informed him (134).

RICHARD K. EVANS. Is a brother-in-law of Mr. Hay. Piper told him that he had substantially agreed to adopt Mr. and Mrs. Hay, and that Mr. Hay and his wife had agreed to look out for them during his entire life, and when he got through with what he had in the world he would convey it, by will or otherwise, to Mr. Hay and his wife. Piper said to witness, "I am going to live here always with Ned and Florence, and they are to take care of me all my life, and make it comfortable for me," and he finished by saying, "and I am going to take care of them in consideration for that" (139).

Piper on many of these occasions, said to witness, "Now, I have arranged with Ned, or Edwin, that he is to provide for me for my life, and in consideration for that I am going to return it by giving all I have to him" (139).

The witness stated also that Piper told him, "Since this house is going to belong to Ned and Florence, I have arranged it so that they can entertain—don't you think that will suit Mr. Hay and his wife, or Edwin and Florence, as he called them; what else could I do for him for taking care of me all my days; could I do anything nicer than that?" Witness added that Piper said that Hay and his wife were to look out for him all the rest of his days, and that he was going to leave them all he had when he was through with it (141).

Being asked on cross-examination what Mr. Hay was to do for Dr. Piper, the witness said: "Ned is to take care of me. He has agreed to do that all my life, and I have agreed to leave Ned all I have, and I am going to adopt them" (143). This witness went to Europe shortly before the Corcoran street house was finished, remained abroad ten years, and his testimony is consequently confined to the period during which the Pipers were with the Hays at the old house" (140–1).

HANNAH FRANEY is a servant in Mr. Hay's family. While living in the old house Dr. Piper said to witness that this house which he was going to build would be his too—for his "son Edwin and Florence"—Piper said to witness that he wanted a larger house to make Edwin a present of it—at his death it would come to Edwin and his children (Rec. 148).

MAGGIE CLARK, one of complainant's servants, testified, but said nothing bearing on the terms of the alleged agreement.

ALBERT S. BROWN. Dr. Piper told witness that they were going to construct this new house on Corcoran street for Edwin and Florence; that they had adopted him; that he and Mrs. Piper expected to spend the balance of their days with them; that the new house was to be built according to Edwin's and Florence's ideas; that it was to be built for them and for their home; that Dr. Piper gave witness to understand that he had no immediate relatives and no one who cared anything about him or Mrs. Piper, and that he and Mrs. Piper expected to live with them for the balance of their lives, and that in consideration of their care and kind treatment and the home that they would have with them, this property was to be theirs at his death (166).

Witness further testified on his direct examination that Dr. Piper told him that he expected to spend the balance of his days there and that the survivor of them—that is, of himself and his wife—at their death would have it; that

the property would then go to Edwin and Florence—as he termed them, his children; that in consideration of this care and affection that they were then bestowing upon him, and that he expected them to continue to bestow upon him, they were to have this house (Rec. 166).

Being asked on cross-examination to specify the details of the supposed agreement between Dr. Piper and Mr. Hay, the witness said that clothing for himself and wife would hardly have been included in the matter of home; that Dr. Piper was to live with Mr. Hay just as his father and mother would live with their son; that if Mr. Hay's father's and mother's needs were such as would necessitate it, he would have furnished them with clothing; but that, as Dr. Piper's needs were not such as would have necessitated such a thing, witness did not suppose clothing was to be included; but that if it had been necessary, Mr. Hay would certainly have done so (Rec. 169).

The witness further expressed his opinion that if Piper had lost his property, Hay would have been bound to continue to furnish him with a home, and added that Dr. Piper frequently said to witness that the house was built for Edwin and Florence in consideration for this care and attention and the home he was to have with them for the balance of his days. Being asked who was to furnish the house, witness said he did not known anything about that part of it. Being further asked whether Dr. Piper said to him that in consideration of this that he was going to do as he expressed to witness, leave Hay this property, witness answered "Yes, in consideration of this care and comfort and this home." He seemed to lay particular stress upon the "affection and comfort," and stated that they were something that money could not buy (Rec., 170).

William A. Cook, a practicing lawyer, testifies that—

Dr. Piper came to witness' office with Mr. Hay. Told witness he desired to have a will prepared, stated the property he wished to embrace in the will and gave directions

accordingly. He stated that he wished the will prepared so that it would vest the title absolutely in Mr. Hay; that Mr. Hay, as well as Mrs. Hay, had been peculiarly kind and good to him, and "that he felt that it was only his duty to make a proper return to Mr. Hay, and that he desired to vest the title to the property in Mr. Hay; . . . that the house belonging to Mr. Hay was not a sufficient house, and he ought to have a better and larger house, and he proposed to buy a lot . . . and have a house erected on it suitable for Mr. Hay for his own accommodation, and one that would exist absolutely in Mr. Hay when completed" (173)

Witness testified that he then had Mr. Hay retire and Dr Piper repeated the directions, and witness proceeded to draw the will. The will was drawn in accordance with these instructions, and executed by Dr. Piper (173, 174).

Subsequently Dr. Piper told witness that he was exceedingly pleased with the disposition he had made of the house in giving it to Mr. Hay; that he had no regret in doing so that his comforts and enjoyments had been greater after the giving of the house; and that if he had it to repeat he would make the same will and the same disposition of the property (174).

Witness said that subsequently Dr. Piper told him that he was greatly pleased that his pecuniary means enabled him to do for Mr. Hay what he had done; that he deserved everything and more than he could give him (175).

Anna D. Kearfoot. Boards with the Hays, and was a member of the household during all the time the Pipers were with him.

Prior to the time when Dr. Piper and his wife came to Washington to live, witness saw letters from them to Hay in which it was stated that the Dr. and Mrs. Piper were very anxious to come to Washington to live and make their home with Mr. and Mrs. Hay, assuming the relationship of father and mother and children to one another—that was the substance of the letters, just expressing the desire

always to come and make his home with them, he and his wife to take the place of father and mother towards Mr. Hay and his wife (264).

This witness further testified on her direct examination that while the Pipers and the Hays were living together in the P street house, and about the time the new house was building, Mr. and Mrs. Hay and Dr. and Mrs. Piper and the witness being together, "Dr. Piper said, that in consideration of Edwin, his son, and Florence taking care of them the rest of their lives, and they being one common family in the house which he was about to build, that he intended and was going to make a will to the effect that this house, as well as the Chicago property, and other property of which he might be possessed at the time of his death—to Mr. Hay or Edwin; or in case of the death of Mr. Hay before their death, the same was to apply with regard to Mrs. Hay, and the property would all go to her; or in case of the death of both Mr. and Mrs. Hay before their own death, that he would take it upon himself to care for the children and bring them up, and if possible, to place Edwin's son—that is Ned, Jr.—in whom he took great interest—that he would place him in life, and that then the property would go to the children of Mr. and Mrs. Hay" (266).

This witness further testified that either at the same time or on another occasion, Mr. Hay remarked, "that if Dr. Piper should lose every cent in the world, that he would consider himself bound to make them happy and take care of them as long as they lived" (266).

Being asked whether any formality was gone through with on the occasion of this contract being talked of, the witness replied, "There was no writing, but they shook hands" (267).

She also testified that in the P street house Dr. Piper told her that he was going to make a will, and then after that he spoke of the fact that Mr. Cook had made a will and he had signed it, and that now everything was all right and

just as he intended it (meaning to Mr. and Mrs. Hay as heirs), and that he wished it to go in that direction and now he was perfectly satisfied. Witness further stated that Piper said in that connection that he had made a former will in which he had left everything to Mr. and Mrs. Hay, but that as he was now building this house on Corcoran street, he would rather make another will so as to more particularly mention it in this house, as the money he had in bank had been drawn out for that purpose, and that he wished a will which would include everything he owned (268).

Being asked on cross-examination what it was that Mr. Hay was to do for Dr. Piper, witness said that Mr. Hay was not to furnish the Doctor his clothing, nor to provide his medicine in case he was sick, nor to pay his doctor's bills, and that Dr. Piper was not to pay for his board; that what Mr. Hay was to do was to make it comfortable in the home —to do everything for his comfort in the way of a home and making him happy, and doing for him as for a father. If Dr. Piper was sick, of course he was to see to nursing him, taking care of him, and if necessary to furnish medicine, but nothing particular was said about this, but that Hay was to do everything for his comfort—that Mr. and Mrs. Hay were to do for Dr. and Mrs. Piper as a son and daughter for a mother and father," and witness added, "that would cover everything, it seems to me" (271, 272).

George S. Hines, proprietor of the hotel at Saratoga where Dr. and Mrs. Piper were stopping at the time of the latter's death, was examined as a witness on behalf of complainant on written interrogatories and cross-interrogatories. He deposes that he first met Dr. Piper at his hotel in Saratoga in October, 1891, at which time he spoke of Mr. Hay "as being with him, living with him, and as being his adopted son;" that he again came to witness' hotel in August, 1892, where he remained until the winter of 1893, his wife dying there. That during his second visit he spoke of Mr. Hay as "Son Edwin" and as his adopted son. That

Dr. Piper executed a will in his presence during this last visit, which was afterwards torn up. "It was taken from a slop jar where it had been thrown, given to me, and I gave it to Mr. Hay when he came to Saratoga about January 1893" (p. 80). This will was executed in the presence of Mr. Hay, witness, the nurse, the sister of witness and Mrs. Piper, and witnessed by three persons, and is in the Record at page 82. The deposition of Frances E. Hine, sister of the last witness (pp. 81 and 82), is much to the same effect. She, however, also mentions another and later will, made at Saratoga after Mrs. Piper's death, which she witnessed, but as to the contents of which she knows nothing.

Defendant's (Appellant's) Testimony.

The answers of the appellant and Richard U. Piper are under oath, and are, of course, to be read as evidence so far as they are responsive to the bill. They deny all of the material allegations upon which complainant bases his prayers for relief.

Richard U. Piper was examined as a witness on behalf of defendants. Being in Newport, Me., his testimony was necessarily taken by commission on written interrogatories. The appellee, however, acting as his own counsel, went on to Newport, and had the advantage of conducting the cross-examination orally.

In response to Interrogatory 4, touching his residence with Mr. Hay and the contract alleged to have been made between them Dr. Piper says:

"Just as I said (i. e., in preceding answer), I came there (to Mr. Hay's house) first on a visit and afterwards boarded with them. There was no agreement of the kind, sir; came there in the first place voluntarily; no, sir, can give no names of places or residences, because there was no contract, either written or oral" (28).

He further states (Ans. 6), "I said there was no contract

but first I boarded with him (Hay). I don't know but I have got to modify that—I mean I lived with him and boarded with him with a verbal agreement to pay my board, and he was to pay me for occupying my house; he should occupy my house. I built a house, and he was to occupy it and pay me in board; pay me good and sufficient board; no, sir, he did not. Well, his agreement was that I have sufficient fire and heat in my room, which I didn't. I had to buy coal and a stove to keep myself warm, one thing. Another thing, the food wasn't what it should have been; quite the reverse" (28).

He denies that he came to Washington in pursuance of any agreement or covenant to live with the Hays—states that there was no such agreement, and no such covenant (28).

Int. 8. As to whether he resided with the complainant in the city of Washington, and who owned the house, and whether he paid the complainant any money for board or maintenance furnished by him during his stay with him and whether if any such payments were made, they were made in pursuance of an agreement with complainant and whether or not witness is indebted to complainant, he replied:

"First I suppose he owned the house himself. I was on a visit with him. Afterwards as I said I built a house and owned it myself. I paid him some money; paid him in the occupation of my house. No, not indebted to him because it was paid as I said before" (28).

Interrogated as to will of January 14, 1886, he says (Answer 11, p. 29): "I never made any such will; not in my memory. As I said before, I made a number of wills. I could not pick out one and identify them at this distance, but I am very sure that I did not make this one, as sure as I can be under the circumstances." He had previously said: "I made quite a number of wills and of course I can't identify them, pick out one from another, but they have all been superseded by another will made about two years hence" (29).

In answer to interrogatory 12, as to whether he and his late wife had adopted complainant as their son, and whether they addressed him as such, "Simply nonsense," no such thing. We never adopted him; never thought of adopting him. It was not my custom to address him as such; very rarely, if ever, said "my son Edwin." She sometimes not unfrequently addressed him so, but mere term of kindness. She believed him. There was no formal agreement, nor was it my custom to address him so. My wife sometimes called him son Edwin; that was when she believed in his honesty and truthfulness; she wouldn't now, if she was alive (29).

In answer to interrogatory 15, as to whether the house was built for complainant, and whether complainant had anything to do with its construction, he replies: "It was not, sir. It was built by me, and not built for complainant. . . . I furnished all the money and all the means, employed an architect and paid him $500 for doing it." He further states that he paid for the lots out of a deposit in the Central National Bank (29).

In answer to interrogatory 18 as to whether complainant contributed anything towards the cost of the house, etc., he replied: Contributed nothing towards the cost of the house; appendages to the house, the furnace and the mantel-pieces —he loaned me some money, some $600 or $800, but that has been all repaid and I have the receipts. Receipts annexed marked Defendant's Exhibits A and B (30). (For said Exhibits see page 41.) States that since he has left the house complainant has occupied it; that he occupies it under a lease from witness, a copy of which he annexes as Defendant's Exhibit "C" (30).

[Note.—This lease, which appears on page 42 of the Record, is a lease of 1512 Corcoran street from Piper to Hay for three years from January 1, 1894, to January 1, 1897, reserving the said Piper four rooms and bears date October

20, 1893.] Inter. 26: "What as to the character of complainant's treatment of yourself and wife during your residence with him in the city of Washington?"

Answer. "It was kind enough so far as his personal conduct with us. Like Byron's Pirate he was the mildest mannered man that ever cut a throat or sunk a ship." "He was all the time trying to cheat me, talking about his love and affection for me, while he was planning to cheat me out of my property" (30).

Int. 27. "What was the conduct of complainant's wife and children towards you and your wife while you resided with complainant?"

Answer. "Very uncomfortable and disagreeable; so much so that I called her a quarrelsome woman. I couldn't propose anything that she wouldn't fight over it, and frequently the ladies didn't speak together. We got so after a while it was almost impossible for us to stay there, and I made up my mind before I went away of the necessity of a change. I couldn't propose anything to the woman that she wouldn't fight me on it" (p. 30).

He further states (p. 31) that the following incident took place in Saratoga: "At that time I was very much out of health, so much so that I could scarcely sit up, and this man (meaning the appellee) was around me trying to induce me to make a will and give him my property and I may possibly have signed a will of that kind. He took me in his arms one time and clasped me to his breast. He came into the room where I was—vacant room—I was standing there—took me in his arms around me and clasped me to his breast. 'You must act with me Doctor, you must act with me. . . . I began to suspect him then very strongly—a manifestation I was not accustomed to . . . he has with me and around me, he and the other robber, Mr. G. S. Thomas" (31).

In answer to Int. 43, he states that complainant has no

claim whatsoever, "only these fictitious ones which he brings about here, a will being made for him, etc., except the lease heretofore mentioned."

Int. 48. State whether or not complainant visited you at Newport; if you say he did, state whether it was at your request or of plaintiff's own volition, and what the object of such visit was?

Ans. "He did, he came of his own proper instance. He came, as I think, to get me out of my property, for he asked me to sign a paper conveying it to him directly,—so many words urging me to do so, and said he would take good care of it and take good care of me, and that I should have a very comfortable living there."

Asked how he came to convey the property involved in this suit to his niece, the appellant states that he did so "of his own proper notion and desire, mainly to make some acknowledgment of the care she has taken of me. She has been more than a daughter to me; I never walk out scarcely without leaning on her arm, and she has taken all the care of me these two years. Hers was care and not talk about care" (32).

He further says in answer to Int. 56 I have no desire to go to Washington because the surroundings there are so disagreeable. I am not under the least obligation to live with the complainant, while he is under a good deal of obligation to me in occupying my house without paying me anything more than a bagatelle of rent for five or six years.

On cross-examination by Mr. Hay: Did you propose to the complainant that you would buy a lot and build a house in which to accommodate two families if he would permit you to come and live with him? A. I never made any such proposition. I built a house and let it to him (34). Asked a circumstantial question as to whether in the presence of his wife, the complainant and Mrs. Kearfoot he did not make the solemn covenant and contract set forth in the bill, he replies—"No; emphatically no. The whole

thing is a fiction. I never did any such thing as that. It is well manufactured, and that is all it is. I never made any such agreement, never thought of any such agreement. I must have been asleep" (35).

"Did this complainant ever suggest to you that you should convey the property by deed to him? Yes, sir, he did. When he came to Newport he said so, that I should deed, and argued with me in regard to it, how the thing could be done. He said in connection with that the laws in the District were pretty strict and the thing would have to be done in a peculiar way, which he knew how to do. Now that is all true; there is no fiction about it. That is what he said. I am no lawyer." (36).

REDFORD W. WALKER, a real estate agent, testifies that the fair rental value of 1512 Corcoran street between 1888 and 1892 was between $85 and $90 per month, and since 1892 about $75 per month. AARON S. CAYWOOD, another real estate agent, fixes $100 per month as the fair rental value in 1892 and prior thereto, and $70 to $75 at the time of testifying (Rec. 65 and 66).

ANNA V. WHITNEY, the appellant, testifies (Rec. 55–62) that Dr. Piper is her mother's brother; that Mrs. Piper regularly corresponded with her mother, and the Doctor always "put something in the letters." They always seemed to be very fond of each other; knew of no strained relations between her mother and Dr. Piper—if there had been any she would have known it—"they always seemed very friendly"; that she has resided in Newport, Maine, for the past twelve years; that she first visited her uncle, said R. U. Piper, in Washington, in 1888 or 1889, shortly after he had moved to the Corcoran street house. "He said he had rented it to this lawyer, Mr. Hay, and that he had reserved apartments for himself, and the remainder of the house he rented to Mr. Hay; that she afterwards visited him several times at the Corcoran street house; that she learned of the fact

that Dr. Piper was ill and gone with his wife to Saratoga, through letters written from Saratoga by Mrs. Piper to witness' mother. That Mrs. Piper expressed the wish that Mrs. Whitney lived nearer, etc., and Mrs. Whitney later received letters written by the nurse after Mrs. Piper was sick in bed, and she then wrote two letters and witness wrote one, saying that witness would come on and care for Mrs. Piper, "and uncle said he never received them;" thinks the nurse, who was getting $25 per week, and did not want to lose her place, "failed to give the letters to uncle." First learned of her uncle having been taken from Saratoga to Chicago through Mrs. Schouler, who had gone to Chicago, and that he was unhappy there. Witness then went to Washington on two occasions, and called on appellee, who informed her "that he expected my uncle home every day—any day—he may come home tonight or tomorrow." It was not until the third visit that Mr. Hay, after witness had told him what she had herself learned of her uncle's unpleasant situation, revealed to her that he knew of the disagreeable surroundings of Dr. Piper, and confirmed her own information. Her visits were made at intervals of five or six weeks. Witness then said she would go to Chicago and invite him to come home with me (meaning to her home in Maine. See cross-examination, p. 61). "I went to Chicago, and mamma had given me a letter of invitation to him to come and spend the summer with her, and I asked him to go home with me and he was very much delighted, and he said, if I go to Maine with you I want to stay always. I want to remain at your house until I die. I said, after you stay during the summer, you may want to go to Washington. He insisted that he would want to stay always." He did not wish to stop over in Washington en route to Newport, although witness suggested that he could readily do so for a few days, but desired to take the most direct route, and they therefore went to Newport via the Grand Trunk route,

and arrived there in the summer of 1895, where he has been residing ever since (and where he has since died).

"Q. It is charged in the bill of complaint, that the deed conveying the property in Washington to you was procured by you through undue influence upon your uncle. State fully how he came to make that deed, and what he said, if anything, in connection with its execution." A. "That is entirely wrong. On the contrary, when uncle first spoke of making the deed—it was directly after it was released from the deed of trust given to Moore—he spoke of giving me a deed of the property here. I said, 'Don't be in a hurry. Wait until the Chicago matter is entirely settled, and then you can convey the property to me or make a will, or fix it as you like, if you wish.' He spoke to me three or four times about it before I would allow him to do it. He did make a deed to me and I gave him a life lease in case anything should happen to him. I opposed it three or four times before I allowed him to do it. He was so anxious to do it. He said something might happen to him; that I had all this time looked out for him, and he proposed making a deed of this property to me" (58).

"Q. How did the life lease happen to be given—at whose suggestion? A. I suggested it to him. I said to a friend of ours, ex-Governor Davis, I am afraid people will think I am after his property. He said, if you feel that way you can just give him a life lease, and that was the way it was suggested to him" (Mr. Davis is an attorney at law) (p. 58).

On cross-examination: "He (Dr. Piper) did not say anything about the relationship that existed between him and the complainant otherwise than as landlord and tenant."

"Q. Has not the Doctor always spoken to you of the complainant in the most affectionate terms? A. No, not always."

"Q. Did he not do so during the first part of his visit to your home. A. No; during the first part he said—when he

was writing about the case—when he was talking about the Thomas matter—he said you possibly knew considerable about the circumstances, as it took a rogue to catch a rogue; that perhaps it was best to have you do something about it, and when you came on your visit we would talk about it. We did talk it over with you, and finally we engaged Mr. Davis for the Chicago matter" (61).

By Mr. Hay: Did the Doctor specify any particular instance in which I did not always treat him with the utmost consideration? A. "He said several times, you don't know Mr. Hay, you don't understand him as I do. I said, why, and he said, no matter. At one time he spoke of the Sharon case. He said that you were trying to keep it until after he was gone, so as to have the money yourself" (62).

SARAH A. WAYNE, testifies that she knew the Pipers when they lived with the Hays at the Corcoran street house and probably at the P street house also; that she visited them and they visited her. They spoke kindly of Mr. Hay, but complained that Mrs. Hay made it unpleasant for both of them. Dr. Piper also complained of being annoyed by the children. One of these conversations took place two or three years before they left for Saratoga, another two evenings before they left. On the latter occasion, Mrs. Piper seemed very unhappy, and said she hoped that while they were away they could make different arrangements, etc. (62).

MARK D. BRAINARD, testifies that he knows all the parties to the suit except Moore; that he is a lawyer by occupation; that he knew Dr. Piper quite intimately—ever since he came to live with Mr. Hay in the P street house, and during all the time he lived in Washington they exchanged calls. That Dr. Piper consulted him about making a will shortly before he left for Saratoga, and witness drew a will under his directions, which was duly executed and was taken away by Dr. Piper. Witness produces and files over objection of complainant's counsel, the minutes or rough draft of this will.

The witness: "I desire to state with reference to this paper, Dr. Piper had several consultations with me at my house with regard to the forms of wills, etc., and he finally brought over this paper and asked me if it was correct. I told him it was not, and he then asked me to make the corrections and to have a correct copy made of it in accordance with the bequests he had made. I made the lead pencil interlineations myself, and the part that is in ink was written by Dr. Piper" (67).

This draft of the will appears at pages 74 and 75 of the record. According to this will, all the testator's property, real and personal (the Corcoran street house being specifically mentioned), goes to the testator's wife absolutely, except a bequest of $1,000 to his sister, Mrs. Whitney. The only reference to complainant made therein is the following: "6. I desire that my wife, Elizabeth F. Piper, shall at her death, if she so choose, give to Edwin B. Hay the sum of ten thousand dollars."

Following is from direct examination of same witness (pages 67 and 69).

Q. Did he at any time speak to you in respect to Mrs. Hay and the treatment accorded to them by her? A. Yes, sir.

Q. Please state what was said in that connection. A. It is impossible for me to give the exact language; it has been a long while ago. I can only give the substance of the conversations or the impressions made upon me at the time. Dr. Piper was not particularly friendly towards Mrs. Hay; he was incensed towards her on account of her religious belief. I reasoned with Dr. Piper and tried to persuade him out of it, but I could not. Then there had been some little matters in the house, which, perhaps, might be trivial in themselves, but Dr. Piper had magnified them into matters of considerable importance. I think Mrs. Hay had said things to Dr. Piper at several times that he had taken umbrage at.

Q. How long were these conversations prior to the departure of Dr. Piper for Saratoga? A. I think it was very shortly after the day he had written that will. I think, perhaps, the day it was written or the day after—about the 24th or 25th of June, 1892. He came over to see me several times—four or five nights in succession—and we talked over this matter, and I endeavored to dissuade him from the course he was taking in this matter. I did not know that he had any real cause of grievance. I thought Mr. Hay was very kind to him. We discussed the matter there in various ways, and all these little details would come in, and sometimes he would discuss morals and talk about religion, both ancient and modern. Dr. Piper was a very intelligent man.

Q. Was there not a change in his kindly expressions of feelings toward the Hay family during the latter part of your acquaintance with him? A. Never, in so far as Mr. Hay was concerned; towards Mrs. Hay he entertained a very strong feeling.

Q. And it arose from two causes? A. Yes, sir; so far as I could ascertain.

Q. Do you recollect at the time of preparing this will of which you speak there being any other will at that time? A. Dr. Piper had a will. Whether it was original or not, I am unable to say. It had the appearance of being original. In this will the son of Mr. Hay was named as beneficiary. When this will was executed Dr. Piper destroyed that other will.

Q. How? A. He burned it.

Q. Do you recollect the provisions for this son in the original will? A. No, sir. I know it was quite favorable for the son. I only read it that one time.

Q. Were any other members of the Hay family remembered in the will except the son Edwin? A. I do not recollect. I suppose a copy of that document is in existence.

Q. Do you know whether Mrs. Piper shared the feelings

of her husband with respect to Mr. Hay? A. Very much more than Mr. Piper. I know I heard her say that she had concealed from the Doctor the fact that Mrs. Hay had joined the Catholic Church, knowing his prejudices.

Q. Did she speak of any other irritating things other than the change in relation to Mrs. Hay's religion? A. Yes, sir. Mrs. Piper was dissatisfied with Mrs. Hay. It was one of those things I felt a reluctance to mix up in. I wanted to act as peacemaker. I thought the Pipers were nice people. They were all friends of mine and I wanted to smooth matters over.

On cross-examination Mr. Brainard was asked whether Dr. Piper did not state, further, how he was living with the complainant? Ans. "I do not think he ever told me the details of the matter. I think on one occasion he stated that he had made arrangements with Mr. Hay or had made a contract with him whereby he was to have a suite of rooms in the house reserved for his benefit, and that Mr. Hay was to pay him, if my recollection serves me right, two hundred dollars a year and board for himself and wife. I have never seen the original agreement, if there was such an agreement, and only state now what I heard the agreement was from Dr. Piper." That this statement was made by Dr. Piper sometime after moving into the Corcoran street house (70–71).

Horace L. Piper, produced as a witness for defendants, testified (see Rec. 71 to 74) that he has lived in Washington over 30 years, knows all the parties to the suit except Moore, and has been well acquainted with Mr. Hay for 25 years; that Dr. Piper is a remote cousin of the father of witness.

Asked when his acquaintance with Dr. Piper commenced: A. "The first I ever heard of him was one day my wife picked up a newspaper and saw the notice of a permit to build a house issued in the name of Dr. Piper."

Q. Did Dr. Piper at any time have any conversations

with you in respect to Mr. Hay or his wife in relation to his residence with them?

A. Yes, sir. He said that he was surprised that Mr. Hay did not mention the fact that he was living with them. He said he had built the house, and that he and his wife were living with Mr. Hay; that it was a business transaction, and that was about all that was said at the time. He invited me to come and see him. I, of course, went up there very reluctantly because of the fact that Mr. Hay, as I thought, did not want the Doctor and his family and myself to come together, and on that account I thought I might not be very welcome.

Q. What gave you that impression? A. This thing had gone on for two or three years, and Mr. Hay and I had met frequently, and he never mentioned the fact that he had living with them a family by the name of Piper. I know if I had of had a family living with me by the name of Hay I certainly would have mentioned it to Mr. Hay.

Q. Was there anything in the conduct of Mr. or Mrs. Hay that gave you that impression? A. I had met Mr. and Mrs. Hay at the Shakespeare Club and at other places, and no mention was ever made to me that they had a family living with them by the name of Piper, and we thought it very strange. We called on Dr. and Mrs. Piper one evening, and Mrs. Piper said, I want to bring Florence (Mrs. Hay) in, and she went and called her, but Mrs. Hay did not come. That occurred a couple of times, and so I thought they did not like our going there, and my wife got the same impression, and that is why I refrained from going. I felt that I had better stay away, and so I did. That was the status of things until about 1892. They came to our house twice to our going to their house once. Dr. Piper is a very intelligent man and a good talker, and Mrs. Piper was a lovely woman. They would talk over their relations with the Hay family—I do not mix up with other people's affairs.

The general tenor of their remarks seemed to indicate that things were not pleasant.

Q. From what statement made by Dr. Piper or Mrs. Piper did you gather that? A. Well, I do not like to state things out here. The Doctor begun to speak rather slightingly of some of our friend's performances.

Q. Who do you mean by that? A. Mr. Hay. I made no special response to that, but laughed. Then there was considerable conversation of an unpleasant kind as to the other side of the house.

Q. As to who, Mrs. Hay? A. Yes, sir.

Q. What was that? A. Well, one of the things was in relation to food. The Doctor could not get steak that he could eat. The madam was not disposed to be obliging, but Mr. Hay tried to make things better.

Q. Was anything said by Dr. Piper as to the treatment they received from Mrs. Hay other than what you have mentioned? A. I can not recollect any special conversation. They both seemed to be out of sorts with her.

Q. Anything that Dr. Piper said in connection with his relations with them you may state. A. Nothing except what I have stated. He spoke rather lightly and sneeringly of Mr. Hay's public life; nothing very definite. On the last visit they told us that they were going away and the Doctor proposed to sell me his house. We were talking about building about that time and something was said about our house. I said, What I want is a double house; I want a house like yours. He said, Buy mine. I said, You don't want to sell; and he said, Yes; I will sell. I said, It was beyond my pile. That was the last time we saw them before we went to Saratoga. The first thing I knew, in picking up a paper, we found that Mrs. Piper was dead and was to be buried here. Our relations were such then with the Pipers that it seemed to me that Dr. Piper should have given me notice of his wife's death; but he did not. I was

not certain whether I would go to the funeral or not. I wrote a note to him, but did not get any answer, and I did not feel any better about it. My wife said, You ought to go up there. I did not want to go; but, against my will, I went, thinking possibly that Dr. Piper was sick. I thought it strange that Mr. Hay did not notify me. I found out that Dr. Piper was not here.

Cross-examination.

By Mr. HAY:

Q. When did you first meet Dr. and Mrs. Piper? A. That was the time I have stated; it was in 1889.

Q. Where was the Doctor and Mrs. Piper living when you first met them? A. At your house.

Q. Did the Doctor in any of his interviews with you speak of the relationship existing between the complainant and himself? A. He said it was simply a business transaction. They expressed surprise that you never mentioned it to us.

Q. You did not know them when they were living at 1535 P street? A. No, sir.

Q. Did they have any conversation with you about the complainant and his treatment of them? A. Only what I have mentioned. We did not encourage it. We generally felt kindly to you, Mr. Hay, and my wife has spoken a whole book full of compliments about you.

Q. Did they mention any instance of the treatment by Mrs. Hay to them? A. About the food was the special instance. They mentioned other instances or, rather, unkind treatments. I do not recollect about them now. They gave me the impression that they were very much displeased with their treatment. I do not think they attributed it so much to you as to the madam.

Q. Then the feeling towards the complainant had not changed? A. Yes, sir; it had changed.

Q. He never spoke about any change in his affection for

the complainant? A. He never intimated to me that he had any affection for anybody in that house except his wife. He said that his living with you was simply a business transaction. He never expressed any affection towards you or any member of your family.

Q. How often did you have interviews with them? A. I felt that I was not welcome in that house, although I had as much right there as any visitor. I stayed away from him many times because I thought your people did not want us. I suppose I have not been there over a half a dozen times in my life.

Q. Was not this a matter of your own imagination? A. No, sir; I do not think I am an imaginative person, I sometimes wished I was (71, 72, 73).